



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

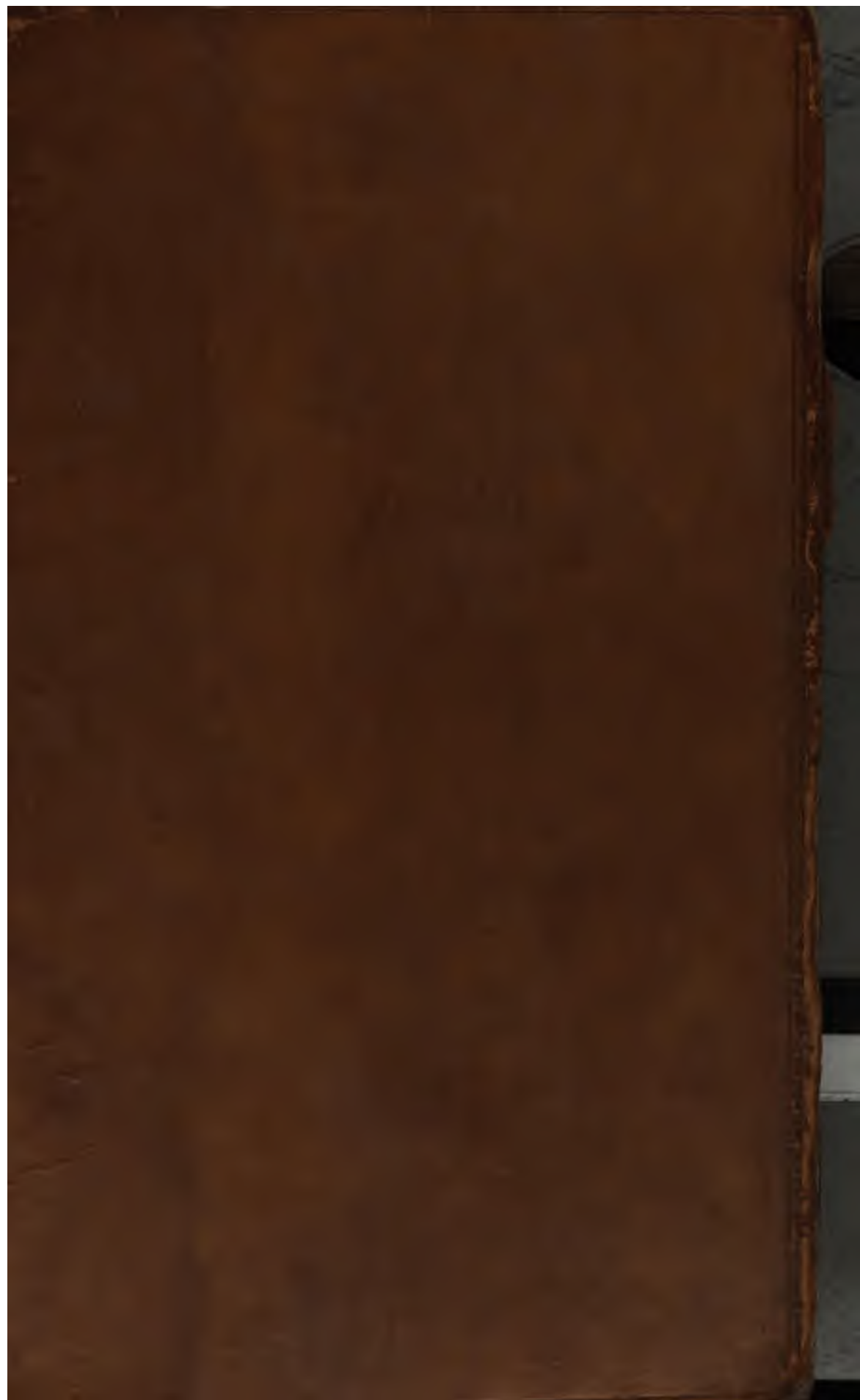
Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



h Eng A-75-d. 27th

h h (h u h

10.0

X-10

REPORTS OF CASES
ADJUDGED IN THE
HIGH COURT OF CHANCERY,

BEFORE
SIR WILLIAM PAGE WOOD, KNT.,
VICE-CHANCELLOR.

By EDWARD E. KAY AND HENRY R. VAUGHAN JOHNSON,
OF LINCOLN'S-INN, ESQUIRES, BARRISTERS-AT-LAW.

VOL. II.

1855 TO 1856:—18 TO 19 VICTORIÆ.

LONDON:
W. MAXWELL, LAW BOOKSELLER AND PUBLISHER,
32, BELL YARD, LINCOLN'S INN:
HODGES & SMITH, GRAFTON STREET, DUBLIN.
1856.

17



LONDON :
PRINTED BY WILLIAM TYLER, BOLT-COURT, FLEET-STREET.

LORD CRANWORTH, *Lord Chancellor.*

SIR JAMES LEWIS KNIGHT BRUCE, . }
SIR GEORGE JAMES TURNER, . . } *Lords Justices.*

SIR JOHN ROMILLY, *Master of the Rolls.*

SIR RICHARD TORIN KINDERSLEY, . }
SIR JOHN STUART, } *Vice-Chancellors.*
SIR WILLIAM PAGE WOOD, . . . }

SIR ALEXANDER JAMES EDMUND COCKBURN, *Attorney-General.*

SIR RICHARD BETHELL, *Solicitor-General.*

	PAGE		PAGE
Eidsforth <i>v.</i> Armstead	- 333	Joint Stock Companies Wind-	
England, Bond <i>v.</i>	- 44	ing-up Acts, Re	- 253
Evans <i>v.</i> Bremridge	- 174	Jones, Macoubrey <i>v.</i>	- 684
F.		K.	
Falkland Islands Company,		Kennedy, African Steam Ship	
Lafone <i>v.</i>	- 276	Company <i>v.</i>	- 660
Ferris, Tee <i>v.</i>	- 357	Kensington (Lord), Rooke <i>v.</i>	753
Fraser <i>v.</i> Kershaw	- 496	Kerr, Thorne <i>v.</i>	- 54
——, Mather <i>v.</i>	- 536	Kershaw, Fraser <i>v.</i>	- 496
G.		Kirk, Davis <i>v.</i>	- 391
Gough <i>v.</i> Davies	- 623	Knight <i>v.</i> Robinson	- 503
Gravesend (Mayor &c.), Ar-		L.	
nold <i>v.</i>	- 574	Lafone <i>v.</i> The Falkland Is-	
Great Cambrian Mining and		lands Company	- 276
Quarrying Company, Re,		Laing, Tucker <i>v.</i>	- 745
Hawkins' case	- 253	Lancaster and Carlisle Rail-	
Great Northern Railway		way Company <i>v.</i> The North	
Company, Sir E. B. Lyt-		Western Railway Company	293
ton <i>v.</i>	- 394	Lantsbery <i>v.</i> Collier	- 709
Gresley <i>v.</i> Mousley	- 288	Law, Clarke <i>v.</i>	- 28
Groves <i>v.</i> Wright	- 347	Ledward <i>v.</i> Hassells	- 370
H.		Lee <i>v.</i> Howlett	- 531
Hall, Johnstone <i>v.</i>	- 414	Lytton (Sir E. B.) <i>v.</i> The Great	
Harris <i>v.</i> Watkins	- 473	Northern Railway Com-	
Harrison, Rooper <i>v.</i>	- 86	pany	- 394
Hassells, Ledward <i>v.</i>	- 370	M.	
Hastings (Lord), Beavan <i>v.</i>	- 724	Macoubrey <i>v.</i> Jones	- 684
Hawkins' case, Re Great		Macrae <i>v.</i> Smith	- 411
Cambrian Mining and		Manchester, Sheffield, and	
Quarrying Company	- 253	Lincolnshire Railway Com-	
Hearn <i>v.</i> Baker	- 383	pany <i>v.</i> The Workso-	
Higgins, Doody <i>v.</i>	- 729	Board of Health	- 25
Hind <i>v.</i> Whitmore	- 458	Marshall, Bennett <i>v.</i>	- 740
Holt, Aubin <i>v.</i>	- 66	Mason <i>v.</i> Baker	- 567
Hovill, Ex parte, Re Banks's		Mather <i>v.</i> Fraser	- 536
Trust	- 387	Matthews <i>v.</i> Windross	- 406
Howlett, Lee <i>v.</i>	- 531	Middleton, Crofts <i>v.</i>	- 194
J.		Morley, Roddam <i>v.</i>	- 336
Job <i>v.</i> Banister	- 374	——, Simpson <i>v.</i>	- 71
Johnstone <i>v.</i> Hall	- 414	Mornington (Earl), Welles-	
		ley (Lady) <i>v.</i>	- 143

REPORTS OF CASES

ADJUDGED IN THE

High Court of Chancery,

BEFORE

SIR WILLIAM PAGE WOOD, KNT., VICE-CHANCELLOR:

COMMENCING (WITH THE EXCEPTION OF A FEW EARLIER CASES) IN

MICHAELMAS TERM, 19 VICT. 1855.

1855.

WRIGHT *v.* VANDERPLANK.

July 20th &
23rd.

ELIZABETH WRIGHT, before her marriage *Elizabeth Vanderplank*, spinster, was the only child of the defendant, *Samuel Vanderplank*, and was born in February, 1822. She was entitled, under devises made in her favour by her

Constructive Fraud—Undue Influence—Parent and Child—Acquiescence—Laches—Account.

In every case of a gift to a parent by a child, shortly after the child attains majority, the Court looks with jealousy upon the transaction, more especially when the parent has, during the minority, been guardian of the child's property, and in receipt of the rents of a considerable estate; and throws upon the parent the onus of shewing plainly and unequivocally that the gift was made, not in consequence of representations on his part, but by the spontaneous act of the child, and that the child had full knowledge of the nature of the deed by which the gift was effected, and of his own position and rights in reference to the property.

A deed was executed by a lady, five months after she came of age, disentailing part of her estates, and giving, for a nominal consideration, an estate for life in the disentailed part to her father, who, during her minority, had been her guardian, and in receipt of the rents of her estates:—*Held* (obiter), that if a bill had been filed shortly after the transaction, either before or possibly after the lady's marriage, which was solemnised sixteen months after the execution of the deed, the transaction could not have been supported,—the deed itself not explaining the nature of the transaction, and it not being shewn that the daughter had proper professional advice,—that the nature of the transaction was explained to or understood by her,—or that the gift was spontaneous or made at a time or under circumstances when she was free from parental influence.

But a bill, which, after the daughter's decease, and nearly ten years after the execution of the deed, was filed by her husband on whom her rights had devolved, praying to have the father declared a trustee of the life interest, and an account of the rents which accrued during his daughter's minority or afterwards, was dismissed on the ground of laches,—it appearing (inter alia) that the Plaintiff was aware of all the circumstances previously to his marriage, and the Court being of opinion, upon the evidence, that, eight years before the bill was filed, both the Plaintiff and his deceased wife had acquiesced in the transaction.

VOL. II.

B

K. J.

1855.
 WRIGHT
 v.
 VANDER-
 PLANK.
 Statement.

mother's family, to an estate in *Northamptonshire*, worth 180*l.* a year, as tenant in tail in remainder expectant on the death of her grandmother, who died in 1831; to an estate in *Leicestershire*, worth 120*l.* a year, as tenant in tail; and to a mansion and 200 acres of land in *Warwickshire*, for an estate in fee. The two last-mentioned estates fell into possession in the years 1824 and 1848 respectively.

As the *Northamptonshire* and *Leicestershire* estates fell into *Elizabeth's* possession, the defendant, as her father and guardian in socage, entered into possession; and he continued in possession or receipt of the rents during his daughter's minority. No account was rendered by the Defendant of the rents so received.

In the year 1836, the Defendant caused a suit, intituled *Vanderplank v. King*, to be instituted on behalf of his daughter, by which, in 1843, her right to a portion of the *Northamptonshire* estates was established. The costs, amounting to between 600*l.* and 700*l.*, were ordered to be paid out of moneys in his hands arising from the income of her estates.

In February, 1843, *Elizabeth* came of age; and, on the 6th of July following, being then residing with her father, she executed the indenture which formed the subject of the present suit.

By that indenture, which was expressed to be made between *Elizabeth*, of the one part, and the Defendant of the other part, and was afterwards enrolled in Chancery as a disentailing deed, after reciting her title to the *Northamptonshire* estates, and that she had then attained her age of twenty-one years, and was desirous, and had determined, to make a disposition of the entirety of the *Northamptonshire* estates, for the purpose of barring her estate tail therein,

and of limiting the same to the uses therein expressed and declared; it was witnessed, that, for the purpose aforesaid, and for the nominal consideration therein mentioned, *Elizabeth* granted and released to the Defendant and his heirs all the said *Northamptonshire* estates, to hold the same, with the appurtenances, unto the Defendant and his heirs absolutely freed and discharged from all estates tail of *Elizabeth* therein, and from all estates to take effect after the determination or in defeasance of such estates tail, to the use of the Defendant and his assigns, during the term of his life, without impeachment of waste, with remainder to the use of *Elizabeth*, her heirs and assigns, for ever.

1855.
WRIGHT
v.
VANDER-
PLANK.
Statement.

In November, 1844, *Elizabeth* married the Plaintiff. In March, 1845, she executed a settlement, limiting the *Northamptonshire* estates to uses, under which, upon her decease, the Plaintiff became entitled to such estates in fee. The limitations in this settlement were expressed to be *subject to the estate for life of the Defendant in the hereditaments therein comprised*. In February, 1850, *Elizabeth* died.

On the 15th of April, 1853, the Plaintiff filed his bill against the Defendant, praying (inter alia), that it might be declared that the life estate limited to the Defendant by the deed of July, 1843, was obtained by him from his deceased daughter by fraud and undue influence, and that the Defendant might be declared a trustee of such life estate for his deceased daughter, from the time of the execution of his deed, and might be decreed to convey such life estate to the Plaintiff. The bill also prayed for an account of the rents and profits of all the estates of *Elizabeth* received by the Defendant, which accrued either during her minority or afterwards, and including an account of the rents and profits of the estates comprised in the deed of July, 1843, which accrued as well before as since the execution of that deed.

1855.
 WRIGHT
 v.
 VANDER-
 PLANK.
 Statement.

The material portions of the evidence relative to the circumstances under which the deed of July, 1843, was executed, and to the subsequent conduct of the Plaintiff and his deceased wife as bearing on the question of acquiescence on their part, are stated in his Honor's judgment.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Cole* for the Plaintiff.—The limitation in favour of the Defendant of an estate for life in the hereditaments comprised in the deed of July, 1843, is one from which this Court will not suffer him to derive any personal benefit. No consideration moved from the Defendant; and to sustain the transaction as a voluntary gift would, under the circumstances of the case, be contrary to public policy.

The transaction is not one of the same simple description as that with which the Court had to deal in *Huguenin v. Baseley* (a). It is the result of a contrivance planned by the Defendant and his solicitor, to keep the daughter in ignorance of her rights. The deed was prepared by the father's solicitor. The form of the deed is ambiguous, and calculated to mislead. It purports to be a disentailing deed, and nothing more. The Defendant's name is ostensibly inserted as releasee to uses. No consideration moved from the Defendant, and the limitation of a life estate to him is wholly unexplained by the deed. There is nothing to shew that, at the time of its execution, the nature of the deed, or the relative position and rights of herself and her father, were properly explained to or understood by the daughter. She had no separate professional adviser; no disinterested person intervened between her and her father. Her only adviser was her father's solicitor, a person under

(a) 14 Ves. 273.

considerable obligation to her father, who was his best client.

1855.
WRIGHT
v.
VANDER-
PLANK.
Argument.

The deed was executed by the daughter little more than four months after she came of age, at a time when she was residing with her father, and under his influence and control; and, even if she understood its effect, still it being in evidence, that for some time before its execution her father had repeatedly represented to her, that he had been a loser by her maintenance, and had expended large sums in recovering portions of her property, the Court will be of opinion, that the gift to the father was not spontaneous, was obtained by undue influence, and cannot be sustained: *Hoghton v. Hoghton (a)*, *Hatch v. Hatch (b)*.

It will be argued, that the gift has been recognised and confirmed by the subsequent deed of 1845, but it is not shewn that, when they executed the latter, either the Plaintiff or his wife had discovered their rights, and were aware that the gift was one which they could successfully dispute. Besides, the mere circumstance that the limitation in the deed of 1844 purports to be made subject to the so called life estate of the Defendant, does not amount to a confirmation or recognition of that estate: *Honner v. Morton (c)*.

Under these circumstances, the Court will declare the Defendant to be a trustee of the life estate for his daughter from the time of the execution of the deed of 1843, and will decree a reconveyance of the property to the Plaintiff, and an account of the rents and profits.

Mr. Willcock, Q. C., and Mr. Hawkins for the Defendant.
—There was nothing unreasonable in this transaction, no-

(a) 15 Beav. 278.

(b) 9 Ves, 292.

(c) 3 Russ. 65.

1855.
 WRIGHT
 v.
 VANDER-
 PLANK.
 Argument.

thing in the transaction itself which would induce the Court to set it aside; on the contrary, it was a transaction which, having regard to all the circumstances, was most natural on the part of the daughter. The Plaintiff had incurred, in the suit of *Vanderplank v. King*,—a suit instituted simply for the benefit of the daughter, expenses amounting to between 600*l.* and 700*l.*, not a farthing of which had, at the date of the deed of July, 1843, been charged to the daughter. The daughter was aware, and had of her own accord remarked, that she had in this and other ways put her father to great expense. A deed like the present, executed under such circumstances as these, the Court will regard as a family arrangement, and will not look into all the motives and feelings which may have actuated the parties in entering into such an arrangement. There may be considerations in such cases which the Court could not possibly reach: *Tweddell v. Tweddell* (a).

The absence of a separate professional adviser does not furnish an insuperable objection. The Court does not consider such advice indispensable. It is only of importance as affording proof that the gift was a voluntary and deliberate act. This was the view taken by Lord Brougham, C., in *Hunter v. Atkins* (b), where, referring to a decision of Sir J. Leach, V. C., in *Griffiths v. Robins* (c), to the effect that the persons claiming the benefit of the gift in that case were bound to shew that it was the result of the donor's free will, and effected by the intervention of some indifferent person, he observes, "But it is quite clear, that he uses this as one obvious test or criterion of that for which we seek in all these cases, namely, the proof of a voluntary and deliberate act, and not as the only way in which the deed could be shewn to be of that description. No man for instance can doubt that, if letters had been produced, written

(a) T. & R. 1, 13.

(b) 3 My. & K. 113.

(c) 3 Madd. 191.

by the old woman for a course of time, and without any interference at all, or conversations had been proved in which her deliberate intention had been expressed, under no agency of influence or deception, the gift would have been good" (a). Here letters are produced written long after the transaction, as late as October and November, 1844, at a time when the daughter was residing at a distance from her father, and indisputably free from his control, and exercising a sound and independent judgment in the disposition of her affairs; and conversations are proved to have taken place before the date of the deed; and, in both, her intention to benefit her father is deliberately shewn. Such a transaction differs in every material circumstance from that which was set aside in *Hoghton v. Hoghton* (b), where the provision for the future was unreasonably large; the deed was not explained to the son; the son had no professional adviser, and was never consulted in reference to the transaction.

1855.
WRIGHT
v.
VANDER-
PLANK.
Argument.

And even if the transaction were one which would have been set aside, if impugned within a reasonable time, the Plaintiff was fully aware of all the grievances of which he now complains, at least as early as January, 1845; and having abstained from filing a bill, or taking any measure to obtain redress until April, 1853, he is now precluded from relief by his own laches. Moreover, it is clear from the evidence, and especially from the deed of 1845, that both the Plaintiff and his deceased wife acquiesced in the transaction as one which had better not be disturbed; and *Davenport v. Bishopp* (c) shews that, as against the parties to that deed, the confirmation of the father's life interest was valid, although the father was not a party, and no consideration moved from him.

(a) 3 Madd. 137.

(b) 15 Beav. 278.

(c) 2 Y. & C. C. C 451, affirm-

ed by Lord Cottenham, on appeal, 1 Ph. 698.

1855.

WRIGHT

v.

VANDER-
PLANK.*Argument.*

With regard to the rents received during the daughter's minority, there is no precedent for the account sought by the bill, the father, whose income was very small, being shewn to have educated and maintained her in a manner which, with other expenses incurred by him on her behalf, must have consumed the whole, or nearly the whole, of her income.

The VICE-CHANCELLOR.—If this bill had been filed before the daughter's marriage, it is clear the transaction of which it complains could not possibly have stood; and for this reason,—the Defendant has not shewn that a full explanation of all the circumstances was made by the father to the daughter before she executed the deed. The onus of shewing this lay with the Defendant, and he has failed to shew it. But upon the point of laches and acquiescence I must hear a reply.

Mr. Rolt, Q. C., in reply.

Two things are required to constitute acquiescence. The parties must know their rights, and they must do acts inconsistent with the supposition that they intended ever to insist on such rights. Neither of these requisites is found here. With regard to the deed of 1845, it is no confirmation of the father's life interest. To constitute a valid confirmation, the parties must be aware that what they are doing has the effect of a confirmation, and must intend it to have that effect: *Murray v. Palmer* (a).

In *Hoghton v. Hoghton* (b), there were some years of delay,—attempted, it is true, to be accounted for by proposals for a compromise; and in this case, up to the year 1848, when the *Warwickshire* estates came into posses-

(a) 2 Sch. & Lef. 474.

(b) 15 Beav. 278.

sion, the Plaintiff had no funds to defray the expense of litigation.

In regard to the rents received by the Defendant as guardian of his daughter, quoad such rents the Defendant was a mere trustee; the Plaintiff, therefore, is entitled to an account, without reference to the Statute of Limitations: *Matthew v. Brise (a)*.

Judgment reserved.

1855.
WRIGHT
v.
VANDER-
PLANK.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 23rd.
Judgment.

This is one of those very painful cases which happily do not often occur. An attempt is made to set aside a conveyance made by a daughter very soon after attaining her majority, giving to her father a life interest in part of her real estate, to which she became entitled on the death of her mother.

I did not hear the reply as to the deed itself, being satisfied that, if the daughter had filed her bill shortly after the transaction, either before or possibly after her marriage, the deed could not have been supported. This Court looks with very proper jealousy on every transaction of this kind between a parent and child, more especially when the parent has, during the minority, been guardian of the child's property, and in receipt of the rents of a considerable estate; and if the child after attaining majority executes a deed by which the parent is to obtain a personal benefit, the Court throws upon him the necessity of shewing, plainly and unequivocally, that such benefit was given him, not in consequence of representations on his part, but by the spontaneous act of the child; and that the child had full knowledge of the

(a) 14 Beav. 341.

1855.
 WRIGHT
 v.
 VANDER-
 PLANK.

Judgment.

nature of the deed he was executing, and of his own position and rights in reference to the property. If those things are clearly made out, this Court has no reason to interfere.

The evidence in this case is very defective in regard to the spontaneous nature of this gift. No doubt it was not a very unlikely gift for a daughter to make, nor perhaps a very improvident one, considering that its effect was to give a life interest to the father in his late wife's property—an interest which, in many cases, the father takes by his marriage settlement; at the same time it deprived the daughter, down to the year 1848, when she came into possession of other considerable property, of one-half the income which would otherwise have come to her. The father, during the minority of his daughter, was in the receipt of considerable sums, forming the income of her property, and has given no account whatever of those receipts.

A more painful part of the case is, that there is a shade still left on the exact nature of the transaction in this respect, that there is no satisfactory evidence of the daughter's having understood the nature of the deed which she executed. Mr. *Edwards*, who was the solicitor of the father, and the father himself, give the only evidence on that subject. Mr. *Edwards* says he had an interview with the lady in May, 1843, she having attained the age of twenty-one years in the February preceding. He says, she stated that she was willing to make the gift. Even that depended on representations previously made by the father, which were coloured by his saying, that he was a loser by her maintenance, and had incurred in respect of her estate considerable expenses in the suit of *Vanderplank v. King*. Independently, however, of its being doubtful, as I said before, whether this was spontaneously the daughter's own gift, it is further doubtful whether she understood the nature of the deed. The deed itself does not explain the transaction. It simply

bars the entail, and then limits the property to the father for life; and Mr. *Edwards*, the solicitor who prepared it, has not taken care, as he ought to have done, to preserve evidence to mark the nature of the transaction. He does not now produce the original draft of the deed as approved by a barrister. Something which is called the original draft is produced, which appears to be a mere copy, without any alterations or marginal observations. The solicitor says he has no entry of the transaction. He made out no bill of costs; and no other evidence is produced of interviews with the daughter. Therefore, the transaction is of far too doubtful a character for it to be possible for the Court to sustain it on its own merits.

1855.
WRIGHT
v.
VANDER-
PLANK.
—
Judgment.

On the other hand there are some favourable circumstances on the side of the father. It seems that he was put to considerable expense. [Mr. *Cole*.—The costs in *Vanderplank v. King* were directed to be paid out of money of the daughter in the hands of the father.] Still that would reduce the income which he was receiving for her maintenance. There is also the favourable circumstance, that, though the transaction was commenced in May, the deed was not executed until July following. There seems therefore to have been no pressure or hurry about it, nevertheless it is enough to say that the transaction is far from being explained satisfactorily, and it is clearly one which, had it been sought to be set aside within the period I have indicated, could not have been supported.

But the deed is sought to be set aside by the husband of the daughter claiming under a settlement which she executed in his favour in 1845, the bill being filed by him in 1853, and under the circumstances which I shall proceed to state.

[His Honour then entered into a minute investigation

1855.

WRIGHT

v.

VANDER-
PLANK.*Judgment.*

of the evidence relative to the conduct of the Plaintiff and his deceased wife from the time of the execution of the deed in question until their marriage, from which he inferred that the following facts were satisfactorily established:—that previously to her marriage, which took place in November, 1844, the daughter had become aware, and had informed the Plaintiff, that by the effect of that deed her father was entitled to a life interest in the disentailed estates; that before her marriage she had expressed her dissatisfaction with the deed to a relative of her family, and consulted, although not professionally, a solicitor, who was a member of the family and who was not her father's solicitor, she being then free from the control of her father; that in consequence the solicitor communicated with other members of her family, who gave it as their opinion that the transaction should not be disturbed; but before her marriage the daughter and her husband were made aware that the transaction was one which might be disturbed if the parties were disposed to disturb it; that for some time previously to her marriage the daughter was free from the control of her father, and left by him at liberty to exercise her own discretion in the disposition of her affairs; that it appeared in the course of a protracted negotiation relative to a settlement of her estates, which it was proposed to execute before her marriage, but which was not eventually executed, and by letters written by her to her father in the course of such negotiation, that she exercised an independent judgment in reference to the distribution of her property, and was competent and prepared to protect her own interest and discharge her duty towards the Plaintiff; nevertheless, although she was aware that by the disentailing deed a life interest was limited to her father in the disentailed property, no mention was made to the father of any objection to that life interest either by the lady herself or by the Plaintiff previously to their marriage; on the contrary, a draft settlement which the father proposed to have

executed, and in which the father's life estate was confirmed by an express limitation, such limitation having been interlined so as to call particular attention to it, had been read, and except in immaterial respects approved by the Plaintiff; and although for other reasons it was not eventually executed, no intimation was made to the father that any objection was entertained by the parties to that portion of the draft, but the only question was whether he should have an annuity instead. His Honour then resumed.]

1855.
WRIGHT
v.
VANDER-
PLANK.
Judgment.

Then the marriage took place, and the father was present at it. He would not have been there probably if there had been any intimation of an intention to raise any further question about his having a life estate. But the matter does not rest there. If the bill had been filed within a reasonable time, it is possible that the suit would still have succeeded. But in the year 1845, after the marriage, the case against the Plaintiff is strengthened. The father it seems had raised questions not very reasonable or handsome about the daughter's marriage outfit being too expensive. That was not a very delicate proceeding, considering his position, and remembering that he had been receiving her income so long, and the arrangement concerning the gift to him of a life estate in her property. It seems that the persons who furnished the daughter's outfit wrote to say that they should look to the husband for payment. On which, in January, 1845, the husband wrote to the Defendant, not at all unreasonably, I think, offended, but shewing no intention whatever of giving up anything, on which he thought he had a right to insist. He says, "I was not a little astonished at being shewn a letter *Elizabeth* received from *Denny* after what had passed between us in *London* the other day. I did not expect to have heard anything more of this affair, which, by the bye, I never ought to have been troubled with, and, as I told you in *London*, no other father-in-law would have allowed

1855.
 WRIGHT
 v.
 VANDER-
 PLANK.
Judgment.

under any circumstances, much less in this instance." He then recapitulates everything. "An only daughter being married, her husband is called upon for her debts by a father who has been living upon her income for these nineteen or twenty years, and has into the bargain got her, the moment she was of age, to sign a deed (whether it is legal or not, I do not profess to say) conveying a great portion of her property to him for life; and after all this he hesitates to pay a few bills for her to the amount of perhaps 200*l*. You told me that in a few days, I think you said last Saturday week, you would send *Denny* a part of his account, instead of which you write to him calling in question his honesty as a tradesman, &c., and he sends it here hinting that he shall enforce the payment of it. Having no claim upon you, perhaps he is right; but if he has no claim upon you I am bold to believe that I have, or my legal adviser is vastly mistaken. I should never have troubled myself about *Elizabeth's* affairs previous to her marriage, but if I am to pay her debts, it is nothing but fair I should know how the property has been expended."

I agree that what he says his legal adviser told him, probably refers to the income received by the father during the daughter's minority; but I cannot forget what had taken place previously to the marriage, and the doubts which then existed as to the father's life interest. Besides, in this letter, the Plaintiff expressly mentions that life interest, adding, "whether it is legal or not, I do not profess to say;" therefore, it is plain, he considers that transaction as part of the matters of which he had a right to complain. He had a legal adviser at hand, but had not consulted him on the subject until after his wife's family had given it as their opinion that the transaction had better not be disturbed. It is plain that the husband at this time thought so. His father-in-law had given countenance to the marriage without any idea that his life interest was to be dis-

puted. Afterwards the husband wrote this letter saying only, "What, will you dispute this charge for your daughter's outfit under all these circumstances?" and the father then paid for the daughter's marriage outfit. He was under no legal obligation to pay this debt. It is said he might be liable to account for the money he received during his daughter's minority, but it is doubtful whether there might be anything due from him on that account. The husband in his letter mentioned all these circumstances, including the life interest given to the father; and it is too much to say, when he has obtained the money, and shamed the father into paying it by all these statements, that he can maintain a suit to set aside the transaction.

1855.
WRIGHT
v.
VANDER-
PLANK.

After all this, a deed of settlement was executed by the husband and wife of the property to which she was entitled, subject to the father's life estate. That was no confirmation of the gift to the father, but it was very strong evidence of acquiescence in it; for if the parties had intended to question it, the simple way would have been to settle the property subject to the life estate of the father, "*if any*." The solicitor who prepared this deed says he did not know that the gift to the father could be set aside; but after all the discussion which took place before the marriage and the letter written by the husband, when he had a solicitor at hand to advise him, I cannot permit him to assume, in his own favour, that it was solely through the influence of his solicitor that the defendant's life interest was reserved in this deed. The plain inference is, that the parties considered the transaction disposed of. The wife never intended to pass by this settlement to her husband a right to sue her father, but both believed that the whole matter was entirely settled. That is confirmed by the evidence of *Howes* the solicitor, who prepared and attested the settlement of 1845. He says that on the occasion of the execution of that settlement, Mrs. *Wright* said that in con-

1855.
 WRIGHT
 v
 VANDER-
 PLANK.
 —
Judgment.

sequence of the life estate being given up to her father, it made her income very small at that time. He adds:—
 “She said that she had given up that life estate to her father.” It is plain that both then considered the matter to be settled. After this, during the whole of the wife’s life, the husband never filed any bill.

In *Hoghton v. Hoghton* (a) the delay was only five years. The Master of the Rolls observes upon it, but says that it is explained by the fact that proposals for a compromise were pending. There is nothing of that kind here. On the contrary, the husband and wife afterwards received some favours from the father, which were of small value no doubt,—a little plate and similar presents,—but they shew that the father could have no reason to suppose that there was any intention to recall the life interest which was given him. It is true, that it would not be for the peace of families to allow fathers to take benefits from their children as this father did from his child; but neither would it be for the peace of families, in a case like this, where a wife had the protection of her husband and friends, after an interval of nearly ten years, to allow the husband to call back from the father a life estate which he had improperly taken by her gift.

I should have noticed, as furnishing further evidence of acquiescence, a letter written by the Plaintiff to the Defendant in September, 1851. It is written in reference to a proposal then in contemplation for a partition and sale of part of the disentailed property. He says, “Let me hear from you directly, with your opinion upon the subject. My opinion is, that it would be decidedly better to sell the whole of the undivided property.” And then he speaks of the Defendant’s life interest in that property, and proposes that, in the event of their concurring in a sale, the proceeds should be invested in the purchase of land in another loca-

(a) 15 Beav. 278, 314.

lity; he speaks distinctly of the Defendant's life interest in the property and treats it as a recognised and subsisting interest.

1855.
WRIGHT
v
VANDER-
PLANK.
Judgment.

Under these circumstances it seems to me that it is far too late now to set this transaction aside. It is plain that on the second marriage of the husband some of the wife's relatives have suggested the expediency of filing the bill, but for the reasons I have given I think it cannot be sustained.

The only remaining question is as to the income of the daughter's property. I never recollect an instance in which, parties who have known their rights having allowed a father to receive the income of his daughter's property, a bill has been filed after the daughter attained her majority to have an account taken in respect of the income received by the father during her minority. If it were a case in which there was any doubt, or obscurity in the transaction, as to the amount of the rents so received, or the like,—if there were any complication of the account, or any thing to lead to the supposition that the matter had not been settled during the daughter's life, it would be a different case; but there nothing can be more simple. There is some little dispute whether the father received 300*l.* a year or less. It appears he sent his daughter to school for some years at 60*l.* a year, and had a governess, and kept up an establishment for her, with a carriage and horses and a groom, and she had the benefit of that establishment. He also embarked in a Chancery suit for her of a doubtful kind, which cost about 600*l.*, and that would have to come out of the rents which he received. The most I could see my way to, under such circumstances, would be—that, having received 300*l.* a year during the daughter's minority, he should be charged with that; but as he seems to have had very little other pro-

1855.
 ———
 WRIGHT
 v.
 VANDER-
 PLANK.
 ———
Judgment.

perty, I do not think such an order is called for. Looking to the income he had, I have no doubt the Court would have allowed him a considerable part of the daughter's income. After a lapse of ten years, it is too much to say that the account should be taken. It would only create disturbance in a manner which this Court never encourages.

The husband, being entitled to raise these questions in 1844, has filed this bill raising them for the first time in 1853, after writing, in 1845, the letter I have read, in which he complained of all the matters in controversy,—after payment by the father of the 200*l.*, of which it was the object of that letter to obtain payment. Since 1848 the husband has been in possession, in right of his wife, of property amply sufficient to enable him to assert his rights; but up to the month of April, 1853, he did not think fit to do so. Upon the whole, therefore, I am of opinion that his conduct constitutes a degree of laches which disentitles him to relief in this Court, and the bill must be dismissed, but without costs.

NICHOLSON *v.* TUTIN.

Creditors'
Deed—Assent
—Execution
after Time sti-
pulated.

WILLIAM WELBANK, of *York*, now deceased, by indentures, dated respectively the 13th and 14th days of January, 1840, granted, assigned, and demised to *Dighton*,

A creditor assigned property, by deed, to trustees upon trust to sell, and apply the clear proceeds in payment of the debts owing by him to such of his creditors as should, before a certain day, execute the deed, and the surplus, if any, to the assignor; and the deed contained a release by the creditors. The assignor and the trustees, who were also creditors, executed the deed at once. No other creditor executed before the stipulated day, but notice of the deed was given to them all, and they forbore to sue, and fifteen years afterwards some were permitted to execute,—the trustees meanwhile having taken possession of and sold part of the property:—*Held*, that the deed was binding on the assignor, and that the creditors were entitled to have the trusts of it carried into effect.

1855.
NICHOLSON
v.
TUTIN.
—
Statement.

retained the balance of the purchase-money in their hands; and they also, immediately after the respective dates and execution of the said indentures, entered into the possession and receipt of the rents and profits of the said hereditaments, and afterwards sold a portion thereof; and *Tutin* and *Watson* had continued in the possession and in the receipt of the rents and profits of the remaining parts thereof up to the present time. *Welbank* died in 1854, intestate and insolvent; and no representation was taken out to him.

The bill was filed by some of the creditors of *Welbank*, on behalf of themselves and all other creditors entitled to the benefit of the trust deed, against the trustees, to have the trusts of the deed carried into effect by the Court, and for an inquiry as to their debts, and as to the property received by the trustees.

The Defendants, the trustees, were also representatives of a mortgagee of the real estate comprised in the deeds.

It appeared in evidence, that the Plaintiffs' solicitor, before they had executed the deed, applied for and obtained a statement of the proceeds of the property sold, and liberty to inspect the trustees' accounts; and that the Plaintiffs shortly afterwards executed the deed by attorney. The Plaintiffs swore that they assented to the deed at the time, and the Plaintiff *Nicholson* stated that *Fowle*, brother of one of the solicitors to the trust, called on him shortly after the advertisement of the deed appeared in the newspapers, and urged him to come in under the deed, and to assent thereto; and that he did assent to it accordingly, and afterwards urged the solicitors to wind up the business. The Defendants denied that the Plaintiffs had assented to the deed, and stated that at the time of the execution of the deed by one *Plews*, as attorney for the Plain-

1855.
 {
 NICHOLSON
 v.
 TUTIN.
 —
Statement.

retained the balance of the purchase-money in their hands; and they also, immediately after the respective dates and execution of the said indentures, entered into the possession and receipt of the rents and profits of the said hereditaments, and afterwards sold a portion thereof; and *Tutin* and *Watson* had continued in the possession and in the receipt of the rents and profits of the remaining parts thereof up to the present time. *Welbank* died in 1854, intestate and insolvent; and no representation was taken out to him.

The bill was filed by some of the creditors of *Welbank*, on behalf of themselves and all other creditors entitled to the benefit of the trust deed, against the trustees, to have the trusts of the deed carried into effect by the Court, and for an inquiry as to their debts, and as to the property received by the trustees.

The Defendants, the trustees, were also representatives of a mortgagee of the real estate comprised in the deeds.

It appeared in evidence, that the Plaintiffs' solicitor, before they had executed the deed, applied for and obtained a statement of the proceeds of the property sold, and liberty to inspect the trustees' accounts; and that the Plaintiffs shortly afterwards executed the deed by attorney. The Plaintiffs swore that they assented to the deed at the time, and the Plaintiff *Nicholson* stated that *Fowle*, brother of one of the solicitors to the trust, called on him shortly after the advertisement of the deed appeared in the newspapers, and urged him to come in under the deed, and to assent thereto; and that he did assent to it accordingly, and afterwards urged the solicitors to wind up the business. The Defendants denied that the Plaintiffs had assented to the deed, and stated that at the time of the execution of the deed by one *Plews*, as attorney for the Plain-

tiffs, the Defendants' solicitor pointed out to him that, the time fixed for the assignment having elapsed, it was doubtful whether his execution for the Plaintiffs would be valid. The trustees' solicitor stated, that *Nicholson*, shortly after the execution of the deed, called upon him, and that he mentioned to *Nicholson* the deed of assignment, and *Nicholson* refused to have anything to do with it; and the Defendants, in their character of mortgagees, relied upon the Statute of Limitations as having barred the debts. The Plaintiffs proved their debts.

1855.
NICHOLSON
v.
TUTIN.
Statement.

Mr. Rolt, Q. C., and Mr. Southgate for the Plaintiffs.

Argument.

The creditors were informed of the deed, and some of them at least have assented to and acted upon it, and even executed it; and though such execution was not until after the time limited for that purpose in the deed, they are entitled to the benefit of it for the future: *Broadbent v. Thornton* (a). In *Harland v. Binks* (b), a deed of assignment was made for the benefit of all such creditors as should come in under and execute it. None of the creditors executed, but the trustee took possession of the property, and then one of the creditors asked and received an explanation of his so taking possession; and this was held sufficient to constitute the relation of trustee and cestui que trust, so as to support the deed. In *Siggers v. Evans* (c), the Court of Queen's Bench decided, that the mere communication of the deed to the trustee, who was also a creditor, and his assent to it, were sufficient to render it irrevocable: *Kirwan v. Daniel* (d).

Mr. Daniel, Q. C., and Mr. W. R. Ellis, for the Defend-

(a) 4 De G. & S. 65.

(c) 19 Jur. 851.

(b) 15 Q. B. 713.

(d) 5 Hare, 493.

1855.
 NICHOLSON
 v.
 TUTIN.
 —
 Argument.

ants, relied on the non-execution of the deed within the time limited, denied that there was any assent, and cited *Forbes v. Limond* (a), in which the Lord Chancellor says, "that no person can be considered to have impliedly acceded to a deed of this sort, within the true meaning of that expression, who has not put himself in precisely the same situation with regard to the debtors, as if he had executed it."

They argued, also, that, before the Plaintiffs executed the deed, their debts were barred by the Statute of Limitations.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am of opinion that the Plaintiffs have made out their right to an inquiry. A deed was executed by *Welbank*, in 1840, by which he assigned all his estate to trustees, in trust for all such of his creditors as should come in and execute the deed within six months. None of his creditors did execute it within that time. The trustees acting under the deed gave notice of the assignment to the creditors of *Welbank*, and made sale of the property; and it is quite clear that they and *Welbank* recognised the deed. It is said, that no creditor could take advantage of the deed, unless he executed it within six months; but, after that time, the parties assumed to act under it; and, therefore, the case is brought within the decision in *Broadbent v. Thornton* (b), that any person taking under a deed having notice of it, and acting under it, although he does not execute it, is entitled to have the benefit of it. *Gould v. Robertson* (c) was a case of a different character. There a mortgagee, having another security of a different nature, insisted upon it, and was not permitted also to take advantage of a

(a) 4 De G., Mac., & G. 315. (b) 4 De G. & S. 65. (c) Id. 509.

creditors' deed made by the mortgagor in favour of creditors who should execute within a certain time, and containing a provision that all persons coming in afterwards would be excluded, the mortgagee never having executed this deed.

1855.
NICHOLSON
v.
TUTIN.
Judgment.

The Court requires it to be shewn, first, that the person claiming is a creditor, and then, that he has acted under the deed.

The case before me is a very strong one. The Plaintiff *Nicholson*, it appears, made a claim for his debt immediately after the deed. He swears that in January he saw the advertisement, and that, after it had appeared, one *Fowle*, a brother of the solicitor to the trustees, called upon him, and urged him to come in under the assignment, and to assent thereto; and that he assented, and considered that he became entitled to the benefit of the deed. *Fowle*, the trustees' solicitor, on the other hand, says that on one occasion he had an interview with *Nicholson*, and that he neither admitted nor denied the debt claimed by *Nicholson*; that he mentioned the assignment, and that *Nicholson* refused to come in thereunder, or have anything to do with it. However, after being so informed, *Nicholson* took no step to recover his debt. It is a strong circumstance to shew acquiescence in the arrangement on his part, that *Nicholson* was told of the deed, and forbore to assert his rights as a creditor: the fact of allowing six years to elapse is in favour of the creditors; they did not interfere, because they were content to abide by the deed. The Plaintiffs did afterwards execute it, while *Welbank* was still alive. They were admitted to execute the deed, being told it is open to all questions which may arise; but the circumstance of their being admitted to execute, and *Welbank* never objecting, is strong *prima facie* evidence of their being creditors.

1855.
 NICHOLSON
 v.
 TUTIN.
 Judgment.

Whatever might be the effect of the Statute of Limitations upon the debts, if the original cestui que trust entitled to the surplus after payment of the debts stands by and allows them to execute the deed, how can I say that he got no advantage thereby? How can I tell that the release in the deed was inoperative, on the ground that the debts were barred by the Statute of Limitations? There may have been payments or acknowledgments to take the debts out of the statute. *Welbank* was content to have a deed executed, by which he got the benefit of a release before this bill was filed. I think that, in this respect, this is stronger than the cases which have been cited.

*Minute
 of Order.*

Take an account of what is due to the Plaintiffs and all other persons entitled to the benefit of the trusts of that indenture.

Take an account of the receipts and payments of the trustees, making all just allowances.

Let the trustees pay the fund into Court upon their own affidavit.

Reserve further consideration.

1855.
 {
 THE
 MANCHESTER,
 SHEFFIELD,
 AND LINCOLN-
 SHIRE
 RAILWAY CO.
 v.
 THE WORKSOP
 BOARD OF
 HEALTH.

Argument.

ment used by the Defendants was the unsettled state of the practice, and that the Plaintiffs could get on that summons the same order they would have by going to the Court, but the Defendants admitted that the Plaintiffs had no other course open to them than to set down the cause on the old exceptions as they had done.

Mr. *Rolt*, Q. C., and Mr. *Collins* for the Plaintiffs.

No further time could be given in Chambers, until the exceptions were allowed in point of form. Exceptions now come in the first instance before the Court: 13 & 14 Vict. c. 35, s. 27; and eight days are allowed when any new exceptions are taken to set them down. Old exceptions may be set down again directly: 16th and 17th Orders, 2nd Nov., 1850; and if not set down within fourteen days after the further answer is put in, such answer is to be deemed sufficient.

The Plaintiffs feared, that submitting to the order for further time would be a waiver of the exceptions. [VICE-CHANCELLOR.—The 26th sect. of the 15th & 16th Vict. c. 80, provides, that “applications for time to plead, answer, or demur,” which seems to refer to the original answer, are to be made at Chambers.]

Mr. *Foster* for the Defendants.

By the 16th Order of Nov. 1850, after the filing of exceptions to the Defendants’ answer for insufficiency, and any further answer put in, the Plaintiff has fourteen days from the filing of such further answer within which he may set down the old exceptions. [VICE-CHANCELLOR.—And if not set down within fourteen days, they are to be considered as abandoned. The Plaintiffs therefore must set them down.]

By submitting, the Defendants gave the Plaintiffs an opportunity of avoiding the setting down. [VICE-CHANCELLOR.—There is no provision that submission shall have that effect. It is necessary to set down the old exceptions again without delay, and then when they are called on counsel must appear, if it is only to say that the exceptions are submitted to.] The matter may be struck out of the paper. [VICE-CHANCELLOR.—There remains the objection that this order for further time may destroy the exceptions altogether.] The Court would not listen to such an objection from Defendants who have given such a notice as that given by us.

1855.
THE
MANCHESTER,
SHEFFIELD,
AND LINCOLN-
SHIRE
RAILWAY Co.
v.
THE WORKSOP
BOARD OF
HEALTH.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

How far any alteration of the practice is desirable will be a matter to be considered hereafter. Sir *George Turner's* Act, in the first place, says that all exceptions shall be set down to be heard by the Court, and then the 26th sect. of the 15th & 16th Vict. c. 80, mentions, amongst the questions to be disposed of at Chambers, "applications for time to plead, answer, or demur;" and there is a power for the Judges to take such other matters as they may think fit from time to time, or as may be directed by any general order. The first part of that section evidently refers to original applications for "time to plead, answer, or demur."—not after exceptions taken, but before the Defendant had answered at all. Then the course pointed out by order 14, of Nov. 2nd, 1850, is this:—You cannot set down exceptions after taking them for eight days, because the party may submit, and then they never get into the paper at all. After the eight days, and within fourteen, you must set them down. Then, if a further answer is put in, by the 16th Order, the old exceptions must be set down within fourteen days, or else the answer is deemed sufficient. When that is done, the exceptions are in the paper to be disposed

Judgment.

1855.
 {
 THE
 MANCHESTER,
 SHEFFIELD,
 AND LINCOLN-
 SHIRE
 RAILWAY CO.
 v.
 THE WORKSOP
 BOARD OF
 HEALTH.
 —
Judgment.

of. And I apprehend the right course for the Defendants to have taken here would have been, when the exceptions were thus set down, to have had some communication with the Plaintiffs, and not to take out this order at Chambers, admitting that the answer is insufficient and asking for further time. Then the matter, being in the paper, under the 17th Order of Nov. 1850, the Court would appoint a time within which to answer. Whatever was ordered to be done by the Court might, if the Judges so thought fit, be disposed of at Chambers. But at present, no regulation having been made by the Judges which would include this case, it would have been much too hazardous to have taken that course. It might have been open to considerable doubt whether the order giving further time would not be a waiver of the original exceptions. I think, under these circumstances, the better course by far for the Defendants to have taken would have been to make some arrangement by which a consent brief could have been handed in when the case was called on, and then to have brought the point before the Court, and not to have an argument upon it at Chambers. I think, therefore, an order must be made now, simply giving further time—whatever further time is required.

Nov. 12th.

CLARKE v. LAW.

New Practice
 —Party—
 Witness—
Cross-examination on Affidavit before Evidence closed—15 & 16 Vict. c. 86, ss. 38 and 40.

THIS was a bill for an injunction to restrain an ejectment.

A party to a cause, filing or giving notice to read an affidavit before the evidence is closed, may be cross-examined upon such affidavit at once, without waiting until the evidence is closed.

A party having filed or given notice to read an affidavit is not at liberty to withdraw it.

An interlocutory motion for the injunction had been made.

1855.
CLARKE
v.
LAW.
Statement.

Interrogatories were filed on the 23rd of March, 1855. The answer of the Defendant *Law* was put in on the 18th of June, 1855. On the 25th of June replication was filed, and a Special Examiner was appointed to take the evidence. Pending the examination *Law* gave notice of his intention to read at the hearing an affidavit made by him upon the interlocutory application in the cause, and the Plaintiff thereupon required him to submit to cross-examination before the special examiner. To this *Law* objected, on the ground that the evidence was not closed; and therefore, under the 38th and 40th sects. of 15 & 16 Vict. c. 86, and the Orders of January, 1855, the time for cross-examining the Defendant on his affidavit had not arrived. *Law* had since given notice that he wished to withdraw the affidavit.

Mr. *Daniel*, Q. C., and Mr. *Welford* for the Plaintiff, referred to sects. 38 and 40 of 15 & 16 Vict. c. 86, and the 5th Order of January, 1855, and cited *Williams v. Williams* (a), which decided that the words of s. 40 of the 15 & 16 Vict. c. 86, included motions for decree, and *Lloyd v. Whitty* (b), in which a motion for an injunction having been ordered to stand over, with liberty to bring an action, it was held that a witness who had made an affidavit on the motion might be cross-examined thereon before the trial.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Bates* for the Defendant, argued that the Defendant was a witness, and that by sect. 38 he could not be cross-examined until after the evidence was

(a) 17 Beav. 156.

(b) 19 Beav. 57.

1855.

CLARKE

v.

LAW.

Judgment.

closed, and that sect. 40 only applied to evidence taken for the purpose of interlocutory proceedings.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I think that by the effect of the 38th sect. of 15 & 16 Vict. c. 86, standing alone, a party being examined in a cause merely as a witness, and there being no authority previously to this statute of cross-examining a person who has simply made an affidavit, the only power given by this section being to cross-examine him after the evidence is closed,—from that circumstance only, though I can see no reason for the rule, a person having made an affidavit to be used at the hearing could only be cross-examined after the evidence is closed, whereas a person who has given oral testimony could be cross-examined at once without waiting for the closing of the evidence. This results from the previous provision in sect. 38, that the evidence on both sides in any suit, “whether taken orally or upon affidavit, shall be closed within such time or respective times after issue joined as shall in that behalf be prescribed by any general order of the Lord Chancellor, but with power to the Court to enlarge the same as it may seem fit; and after the time fixed for closing the evidence, no further evidence, whether oral or by affidavit, shall be receivable;” and then it seems to have occurred to the framers of the Act, that, having thus prevented the receipt of any further evidence, there could be no cross-examination upon affidavits, but as they might be filed at the last moment it was necessary to add a proviso, that a party making an affidavit might be cross-examined after the evidence was closed. There does not seem to be any reason for imputing an intention to the framers of the Act that such witnesses should not be cross-examined before the evidence closed, or for supposing that this proviso meant to say that no such cross-examination

should take place before that time. I must, therefore, look to the positive words of the statute, unembarrassed as they are by any express prohibition. A further difficulty was, that under the old practice no one could be compelled to give evidence, or to be made a witness upon an interlocutory application; and sect. 40 is framed mainly with the view of altering the practice in this respect. By the first part of that section, any party to a cause may require the attendance for examination of any witness "for the purpose of using his evidence upon any claim, motion, petition, or other proceeding before the Court, in like manner as such witness would be bound to attend and be examined with a view to the hearing of a cause;" clearly shewing that this provision was intended to apply to interlocutory proceedings; "and any party having made an affidavit to be used, or which shall be used on any claim, motion, petition, or other proceeding before the Court," following the same words which had been previously used in contemplation of other proceedings than the hearing of the cause, "shall be bound, on being served with such writ, to attend before an examiner for the purpose of being cross-examined: Provided always that the Court shall always have a discretionary power of acting upon such evidence as may be before it at the time, and of making such interim orders or otherwise as may appear necessary." All that points to interlocutory proceedings; but the question is, whether, for the furtherance of justice, it is impossible to attribute to the words "other proceeding" any other meaning than interlocutory proceedings, not the hearing of the cause. I think that the hearing may be included in those words, and that the provision is not necessarily to be confined to other proceedings exclusive of the hearing of the cause. There is some indication of this in that part of the 40th section which refers to an affidavit "to be used or which shall be used" in any proceeding before the Court.

1855.
CLARK
v.
LAW.
Judgment.

1855.
CLARKE
v.
LAW.

Judgment.

Then as to the next point. When a party gives notice that he intends to use at the hearing an affidavit made by him, he is both a party and a witness. If he had filed a new affidavit, he could not say that he would not use it. He has propounded himself as a witness, and cannot be allowed, if not cross-examined, to use his affidavit, but if threatened with cross-examination to withdraw it: having tendered himself as a witness, he is bound to submit to cross-examination. I have no doubt upon this point; the other is more difficult, and the Plaintiff asks me to give a somewhat liberal interpretation to the Act; but this is a statute which ought to be construed liberally, and I cannot see any reason why this Defendant should not be cross-examined at once.

Order that the Defendant *Law* shall attend before the Special Examiner and be cross-examined. Costs to be costs in the cause.

1855.

WOOD v. SCARTH.

Nov. 9th &
12th.

THE Defendant *Scarth*, being the owner of a newly erected messuage, intended for a public-house, to be called "The Quill," and knowing that the Plaintiffs, who were a firm of brewers, were desirous to take a lease of it, wrote to them as follows:—

Vendor and Purchaser—Specific Performance—Defence—Mistake—Evidence.

"Putney, 8th July, 1853."

"Gentlemen,—The terms for the intended new public-house at *Putney* are, 30*l.* yearly rent to Lady-day next, and from that time 63*l.*, on a lease of twenty-five years, to commence from the next quarter day after obtaining the license. There will be no difficulty about Mr. *Young*: a neighbouring proprietor is wholly in my interest; and I have at ground rent and rack rent one hundred houses near it. Pray let me know if it suits you, at your earliest convenience, as I am giving all the brewers who left cards the offer in rotation; and I am going to my place in *Hants* in the middle of the week. I am the landlord of the *Swan* at *Walham*

The Defendant, being the owner of a public-house, wrote to the Plaintiffs, who were a firm of brewers, and offered it to them on lease, at a certain rent, and begged to be informed, at their earliest convenience, if the offer suited them, "as I am giving all the brewers who have left cards the offer in rotation." Subsequently, a

clerk of the firm met the Defendant on the premises, and discussed the terms of the lease; and afterwards one of the Plaintiffs wrote to the Defendant—"I have viewed the premises, having had my clerk's report, and we are willing to take them of you."

Held,—1. That such letters constituted a valid agreement for a lease.

2. That, *prima facie*, the terms on which the lease was to be granted must be taken to be those expressed in the first letter.

3. That the Defendant was at liberty to resist a suit for specific performance of such agreement, by proving that he had made a mistake in stating the terms for the lease in the first letter.

4. That such mistake was well proved in this case, by shewing that the Defendant had, previously to writing this letter to the Plaintiffs, offered the premises to other brewers, upon terms which included the stipulation which he stated had been omitted in such letter by mistake; because such previous offer must be taken to be "the offer" which he stated in such letter that he was giving to the applicants in rotation.

Held, also, that want of memory and inaccuracy on the part of the Defendant only affected the credibility of his evidence, and did not prejudice his right to relief, as the mistake was clearly proved by other evidence.

1855.
 {
 WOOD
 v.
 SCARTH.
 —
Statement.

Green, which was in your trade many years, and which you may have again on terms; the tenant only holds at will.

"I remain, Gents.

Your most obedient servant,

"Messrs. WOOD & Co."

HENRY SCARTH."

After having received the last-mentioned letter, the Plaintiff *Wood* answered as follows:—

"*Artillery Brewery, Westminster*, 9th July, 1853.

"Dear Sir,—I have been so very busy, that I must, for a day or two, claim your indulgence. I will endeavour to see the property on Monday, and let you know. Will you say some day when you are in town, that I can see you; and, perhaps, we could arrange about the *Swan* also.

"Yours obediently,

"H. SCARTH, ESQ., *Putney*."

J. C. WOOD."

The Defendant replied:—

"*Putney*, 10th July, 1853.

"Dear Sir,—I shall leave for the country this week, but would go to *London* late to-morrow, if you could send one of your gentlemen here. I will not leave *Putney* before one o'clock; I think an interview might much facilitate our business. I will be at the last Post Office, near the railway station, from eleven until one o'clock on Monday.

"I remain,

Your most obedient servant,

"J. C. WOOD, ESQ., *Brewer*."

HENRY SCARTH."

Accordingly the Plaintiff *Wood*, by letter dated the 12th of July, appointed Wednesday, the 13th of the said month of July, as the time for the Plaintiffs' clerk to view and report upon the premises proposed to be leased, and to have

an interview with the Defendant upon the subject of his offer; and, on the said 13th of July, *Shedlock*, a confidential clerk of the Plaintiffs, met and had an interview with the Defendant at the said house, and (as the Plaintiffs stated) "then and there the said *Shedlock* and the Defendant discussed the terms for the lease proposed by the Defendant in and by his said letter of the 8th day of July as aforesaid, and, in particular, they considered and discussed together the amount of the proposed rent, namely 63*l.* per annum; and, as to such rent, *Shedlock* observed to the Defendant, that he thought it was rather too much, to which the Defendant replied, that he thought it a fair rent; and, in the course of the conversation which so took place with reference to the proposed rent, the Defendant mentioned an agreement he had then lately entered into for letting another public-house in the neighbourhood, called the '*Arab Boy*,' the rent reserved for which was 50*l.* per annum, in addition to a premium of 400*l.*; whereupon *Shedlock* pointed out that there were, what he considered to be, certain superior advantages incident to the said '*Arab Boy*' public-house, and yet that the rent asked of the Plaintiffs was 13*l.* more than the rent reserved for the said '*Arab Boy*' public-house; upon which the Defendant remarked that he got 400*l.* premium for the '*Arab Boy*,' or to that effect (meaning thereby to refer to the circumstance, that he was not asking any premium for the said public-house called the '*Quill*'). At the same interview, and after the aforesaid conversation, the Defendant said to *Shedlock*, that he could not alter the terms sent to Mr. *Wood*, meaning the terms contained in the said letter of the 8th day of July; and he then repeated the terms, which were to the same effect as those contained in the said letter, without any variation; and he also stated, that he would finish the house and premises (except papering, as he found the tenants sometimes objected to the paper that the landlords used). At the same

1855.
 {
 WOOD
 v.
 SCARTH.
 —
Statement.

1855.
 {
 WOOD
 v.
 SCARTH.
 —
Statement.

interview, the Defendant asked *Shedlock* when he could have an answer, as, in the event of a refusal by Mr. *Wood*, he should offer the house to certain other firms in the brewery trade, which he mentioned, in rotation, to which *Shedlock* replied, that Mr. *Wood* was not in town, but he expected him on Friday or Saturday then next; and, that the Defendant would hear from Mr. *Wood* on Saturday or Monday then next."

Subsequently, the Plaintiff *Wood* wrote to the Defendant as follows:—

"Putney, 16th July, 1853."

"Dear Sir,—I was in hopes I might find you here to-day. I have viewed the premises, having had my clerk's report, and we are willing to take them of you. Any further communication addressed to the brewery, shall be attended to.

"I am, yours obediently,

J. C. WOOD."

On the 1st day of September, 1853, the Plaintiff *Wood* received from the solicitor of the Defendant the draft of a formal agreement proposed to be made between the Defendant and the Plaintiff *Wood*; by which the Defendant was to grant to the Plaintiff *Wood* a lease of the said house and premises for twenty-five years, from the 24th day of July, 1853; and, in case a license should be obtained for selling ale, beer, porter, spirits, and other excisable liquors by retail in the said premises, for such further number of years as would make up twenty-five years from the quarter day next after such license should be obtained, at the yearly rent of 63*l.*, after the 25th day of March, 1854, and a rent at the rate of 30*l.* per annum for the half year preceding, payable quarterly; and, by such draft agreement it was (as the Plaintiffs alleged, "improperly and contrary to the terms so agreed as aforesaid") expressed, that the Plaintiff *Wood*

1855.
 {
 WOOD
 v.
 SCAETH.
 —
 Argument.

Mr. *Rolt*, Q. C., and Mr. *W. D. Lewis*, for the Plaintiffs, cited *Calverley v. Williams* (a), *Malins v. Freeman* (b), *Neap v. Abbott* (c), and *Watson v. Marston* (d), upon the general law applicable to mistake as a defence to a suit for specific performance; and argued, that, in this case, there was such gross negligence, that the Defendant should not be permitted to escape from his written contract: *The Duke of Beaufort v. Neeld* (e), *Wood v. Richardson* (f).

Mr. *W. M. James*, Q. C., and Mr. *Freeling*, for the Defendant, argued, that the remedy at law was sufficient; that, in all cases of mistake, there was of necessity considerable carelessness, but that this consideration did not affect the discretion which Courts of equity exercised in such cases, to refuse specific performance; and they cited *Faine v. Brown* (g), *Wedgewood v. Adams* (h), *Costigan v. Hastler* (i), and *Harnett v. Yielding* (k). Then it was not shewn that there was any written acceptance of the terms in the Defendant's first letter; for the Plaintiff's letter, signifying that he would take the house, did not refer to the letter of the Defendant.

Mr. *Rolt*, Q. C., in reply.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

In my judgment, one point which has been argued does not arise in this case, regard being had to the terms of the Defendant's letter of the 8th of July, 1853, and the Plaintiff's letter of the 16th. In the latter, the Plaintiff *Wood*

(a) 1 Ves. jun. 210.

(b) 2 Keen, 25.

(c) C. P. Coop. 333.

(d) 4 De G., Mac., & G. 230.

(e) 12 Cl. & F. 248.

(f) 4 Beav. 174.

(g) 2 Ves. sen. 307.

(h) 6 Beav. 603.

(i) 2 Sch. & Lef. 160.

(k) Id. 549.

1855.
WOOD
v.
SCARTH.
Judgment.

ment, of which he repents, possibly thinking that he has not asked enough, upon slight parol evidence. With respect, therefore, to that part of the evidence which goes to shew that the Defendant's agent was instructed originally to ask a premium, supported as it is by the evidence of the agent, I at once say, looking to the consequences of admitting this kind of parol evidence to avoid a contract, that I could not allow the Defendant to escape, merely because he himself swears that he had always intended to insert the term of the 500*l.* premium in his letter, nor because of the oath of his agent, to the effect that the Defendant had given him accordingly instructions as to the terms of letting the house. But I find something written, which, coupled with overt acts proved by the evidence of a disinterested witness, seems to bring the case up to the numerous authorities in which mistake has been permitted to be a defence to a suit for specific performance. The fact which the Defendant mentions in his first letter is, that he is giving to all the brewers in rotation *the* offer. There is no ground for contending that the mode in which he would give them the offer in rotation would be by offering the premises to other persons than the Plaintiffs, upon different terms, for instance, excluding the 500*l.* premium. That is a preposterous suggestion, and is not consistent with the ordinary dealings of mankind, nor with the language of the letter. The offer mentioned in the letter must be the identical offer which he thereby intended to make to the Plaintiffs. Then if I find that the Defendant had made to *Elliot & Watney*, who were first on the list of applicants, *the* offer of which he speaks in that letter, and that such offer included the term of the 500*l.* premium, I must hold that the Defendant meant in this letter, but for the written language of it, to repeat the identical offer which he had made to *Elliot & Watney*, and that such offer was intended to include the term of the 500*l.* premium as well as

1855.

WOOD
v.
SCARTH.

—
Judgment.

"You cannot avoid your own act in a case of negligence of this kind, many other persons being interested in the matter, solely on account of what you kept in your own breast."

That a person shall not be compelled by this Court specifically to perform an agreement which he never intended to enter into, if he has satisfied the Court that it was not his real agreement, is well established. Perhaps no case better illustrates the principle than *The Marquis of Townshend v. Stangroom* (a), which shews both that an agreement will not be specifically performed by this Court with a parol variation; and, on the other hand, that this Court will not decree specific performance without such variation, if it be relied on as a defence.

Then what is the effect of this Defendant having said that he had made a mistake in his original proposal, and that subsequently he had an interview with the Plaintiff's agent, and told him the real terms of the proposed lease, and that such agent perfectly understood and assented to those terms, including the 500*l.* premium? Supposing him to fail wholly in establishing that proposition, I cannot see how that is to vary his rights. It would affect his credibility; but I need not give the least credit to his testimony on the subject. I mean, that I do not find his evidence necessary. There is the written document, which he has signed, mentioning the course of rotation he was about to pursue in making the offer of a lease; and the other evidence on which I rely is the testimony of Messrs. *Elliot & Watney's* agent—a disinterested person—and not the evidence given by the Defendant in his own cause.

If, the Defendant's testimony being shaken upon one point, I should be inclined to doubt other evidence given

(a) 6 Vea. 328.

1855.
 }
 WOOD
 v.
 SCARTH.
 —
Judgment.

any premium, which was not unnatural, as the term was so short.

I dismiss the bill, without costs, and without prejudice to an action for damages, and to the costs of this suit being included in such action.

June 28th;
July 24th.

BOND v. ENGLAND.

Mortgage—
Exoneration—
Heir—Next of
Kin—Admini-
stration.

James E.
 mortgaged
 real estate,
 and died in
 1850, intestate,
 leaving his father *Edward E.*
 his heir at law
 and sole next
 of kin. *Edward E.*
 died intestate,
 and without
 having obtained
 letters of adminis-
 tration of the
 personal estate
 of *James*:
 —*Held*, that
 the personal
 estate of
James was lia-
 ble, as between
 the heir and
 personal repre-
 sentative
 of *Edward*
 and *James*, to
 be applied in
 discharge of the
 mortgage debt in
 exoneration of the
 real estate.

JAMES ENGLAND died in May, 1850, seised in fee simple in possession of freehold lands, which he had acquired by purchase, and which were subject to mortgages created by him, and possessed of leasehold lands and other personal property. He died intestate, both as to his real and personal estate, leaving his father, *Edward England*, his heir at law and sole next of kin.

Edward England died in June, 1850, also intestate both as to his real and personal estate, without having ever obtained letters of administration of *James England's* personal estate, and without having in any way dealt with his real estate or with the mortgages thereon.

The real estate of *Edward England*, including the mortgaged estates, descended upon his grandson and heir, *William England*, who was also heir to *James England*.

In August, 1850, letters of administration of the personal estate of *Edward England* were granted to his daughter

Observations upon the conflict of authorities on the subject of exoneration.

1855.
 BOND
 v.
 ENGLAND.
 —
Argument.

that the mere circumstance of the real and personal estate of the deceased mortgagor having become united in his heir or devisee, is sufficient to discharge the personal estate from its primary liability.

The contest is, in truth, between the real and personal representatives of *Edward*, not *James*; and though the Defendant, claiming as heir, must trace his descent back to *James*, who was the last purchaser, yet he must trace that descent through *Edward*, and take as standing in his place and representing him: *Paterson v. Mills* (a).

Mr. Rolt, Q. C., and Mr. Peck for the Defendant.—After the death of *James England*, *Edward England*, as his sole next of kin, became entitled to the residue only of the personal estate of *James*, after payment of all his debts, including the mortgage debts; and *Edward*, never having taken out letters of administration of the personal estate of *James*, never took any further or other interest therein: consequently, such personal estate never ceased to be and still is the fund primarily liable to the payment of the mortgage debts.

It is impossible to say, that there was ever in this case the union of interests in *Edward England*, on which the Plaintiff relies. On the death of *James*, his real estate vested in *Edward*, but his personal estate did not. A right to administration, and a right to a beneficial interest in the residue after payment of *James's* debts, vested in *Edward* on *James's* death. But, in no other sense did the personalty ever vest in *Edward*; and the argument founded upon a union of interests, fails.

The VICE-CHANCELLOR.—The only question for reply

(a) 15 Jur. 1.

will be, whether the absence of administration made any difference as to the real and personal estate being at home in *Edward*.

1855.
BOND
v.
ENGLAND.
Argument.

Mr. *Daniel* in reply.—We submit that it did not. Administration is the consequence of a right to the beneficial interest in the personal estate, and not the converse. If a son dies intestate, or a wife, the husband of such wife and the father of such son are entitled to the whole of their personal estate, and to administration; and if such husband or father dies before administration granted to them, yet the personal estate of their intestate was an interest vested in them, and shall be part of their personal estate, and administration shall be granted to the representative of such husband or father; for the Spiritual Court regards the property in granting administration: *Viner's Abridgment*, tit. "Executors," and *Bacon v. Bryant* there cited; *In the Goods of Gill* (a), *Fielder v. Hanger* (b); and see *Williams' Executors*, 338, 339.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 24th.
Judgment.

The question I have to consider is, whether, under the circumstances of this case, *William England*, the heir of *James England*, who originally created a mortgage of certain real estate, is entitled to have that mortgage paid off out of the personal estate of *James England*, not yet administered, but as to which he left his father, who was his heir, his sole next of kin, and therefore the person who had the right to take out administration.

(a) 1 Hagg. 341.

(b) 3 Hagg. 769.

1855.
 BOND
 v.
 ENGLAND.
 Judgment.

The difficulty is created by the doctrine of the Court on this subject having been completely reversed by the decisions of late years. According to the earlier authorities, beginning with Chief Baron *Gilbert's* treatise, if a fund was invested on mortgage of real estate, as between the heirs of the party making the mortgage, and those who claimed his residuary personalty, subject to the payment of his debts and legacies, the real estate was considered to be merely a security, and the personalty was the fund primarily liable to pay the mortgage debt. That doctrine was followed to such an extent, that, according to Chief Baron *Gilbert (a)*, if a deceased mortgagor had left his heir also his executor, and that executor had converted to his own use assets of his testator, equivalent to the mortgage debt, then, on his death, his heir would have been entitled to come upon his executors, to exonerate the mortgage out of his personal estate. That is an extreme view, because it can hardly be supposed that the executor took that money with any other intent than that of appropriating it for his benefit out of the assets. This doctrine, however, seems to be supported by the decision in *Lord Effingham v. Napier (a)*, and by

(a) "If the grandfather mortgages his lands, and covenants to pay the mortgage money, and the land descends to the father, and the father dies leaving a personal estate of his own, it shall not go in exoneration of the mortgage of those lands descended to the grandson, because the personal estate of the father was not liable to the grandfather's debt, and there is no equity that any part of the personal fortune of one should be applied in exoneration of such debt. Whence it seems, that if

the father had been executor to the grandfather, and the grandfather had left assets to the value of the debt, and the father had converted them to his own use, then so much of the father's personal estate had been liable to the payment of the grandfather's debts; and the grandson could in such case have come upon the father's executors to exonerate the mortgage out of the father's personal estate." *Gilbert's Lex Præc.* And see *Treat on Eq.*, Vol. ii., p. 289.

(b) 3 B. P. C. 1.

what fell from the Court in *Evelyn v. Evelyn* (a), with reference to that decision. In *Lord Effingham v. Napier* the facts were these:—Sir *John Napier*, the grandfather, left real estates, subject to considerable mortgage debts. He left also other real estate, and some leaseholds and other personal estate; and, by an Act of Parliament, the latter were vested in trustees, in trust to pay the debts of the grandfather, and subject thereto, in trust for his son, Sir *Theophilus*, who became entitled to the mortgaged estates; so that he was the person entitled to the surplus of the fund set apart for payment of the debts, and also the person entitled to have those debts paid off. Sir *Theophilus* appropriated the fund; and his personal estate having been augmented by that fund, the House of Lords held that his nephew and heir had a right to have the mortgaged estate exonerated out of his assets. That is the ground on which the decision in *Lord Effingham v. Napier* was put in *Evelyn v. Evelyn* (a), where the Lord Chancellor (who, with the concurrence of Lord Chief Justice *Raymond* and the Master of the Rolls, delivered the resolution of the Court,) said, that *Evelyn v. Evelyn* “was not like the case of Sir *John Napier*, where part of the estate of Sir *John*, the mortgagor, was after his death settled by a private Act of Parliament in trustees, as a fund to pay all his debts; and Sir *Theophilus*, the son and heir of Sir *John*, disposing of that fund, was consequently answerable for the debts, *having had the benefit of the fund set apart for them*; for which reason it was but just, that, upon his death, his personal estate should be answerable for the debts of his father.” And yet he was the person who was entitled under the Act to the mortgaged estates, and also to the surplus of the fund appropriated for payment of the mortgage debts.

1855.
BOND
v.
ENGLAND.
Judgment.

That, therefore, seems to have been the old doctrine: the

(a) 2 P. Wms. 664.

1855.
 {
 BOND
 v.
 ENGLAND.
 —
 Judgment.

Court was to consider how far the personal estate had been increased by the circumstance of the debt having been allowed to remain a charge upon the real estate; and it is in accordance with *Lord Belvedere v. Rochfort* (a) and the other cases referred to by Lord Justice *Knight Bruce* in *Lord Clarendon v. Barham*. In *Lord Belvedere v. Rochfort*, which was an extremely strong case, the devisee of the mortgaged estate was also executor and residuary legatee under his father's will, and had for years been in possession of the whole property, both real and personal; and his son, to whom he had devised the mortgaged estate, was held entitled to have the mortgage debt paid off, as being the grandfather's debt, out of personal estate of his grandfather in the appellant's hands as executor of his father.

The case of *Lord Belvedere v. Rochfort* seems to have been overruled on both points. It was overruled on one point in *Tweddell v. Tweddell* (b) by Lord *Thurlow*, who directed his attention to the question, whether the debt was to be treated as the grandfather's debt at all. He had purchased the estate subject to a mortgage, and Lord *Thurlow's* objections were pointed to a formal error in the decree, in which the debt was treated as a charge created by the grandfather. Lord Justice *Knight Bruce* adverts to this in his judgment in *Lord Clarendon v. Barham* (c). Lord *Thurlow* having, in *Tweddell v. Tweddell* (d), overruled the first part of the decision in *Lord Belvedere v. Rochfort*, and *Tweddell v. Tweddell* having been since followed, the remarkable fate of *Lord Belvedere v. Rochfort* was, that the other point which it decided was distinctly overruled by Sir *J. Leach* in *Scott v. Beecher* (e), a case which was followed by Lord *Langdale* in *Lord Ilchester v. Lord Carnarvon* (f), and again by Lord *Lyndhurst* in *Evans*

(a) 5 Bro. P. C. 299 (Toml. ed.);

(d) 2 Bro. C. C. 101.

(b) 2 Bro. C. C. 101.

(e) 5 Madd. 96.

(c) 1 Y. & C. 711.

(f) 1 Beav. 209.

v. Smithson (a). Lord Justice *Knight Bruce*, in *Lord Clarendon v. Barham (b)*, came to the conclusion that it was so overruled, and very reluctantly decided that case against what would otherwise have been his own view.

1855.
BOND
v.
ENGLAND.
Judgment.

Upon the whole, therefore, the result has been, that where the same person has been executor and residuary legatee of a mortgagor, as well as heir or devisee of the mortgaged estate, upon the death of such person his personal estate has been held not liable to repay the mortgage debt; and it has been so held on the ground on which it is put by Sir *John Leach* in his judgment in *Scott v. Beecher (c)*, where, passing by the old question whether the personal estate had been benefited (in which case it ought, according to the earlier authorities, to have been applied in payment of the debt), he says, the personal estate became the personal estate of the devisee of the mortgaged estate, but the mortgage debt was not the debt of the devisee, the devisee took the real estate with the equity to have the personalty applied in its exoneration, but she took it charged with the mortgage, and therefore the party claiming as her heir claimed the estate charged with a debt not created by his ancestress, and could not go against her personalty in order to be recouped a debt which was not hers.

The difference here is this:—It is a difference which has made it necessary for me to look through all the cases, but I cannot find anything very distinctly throwing light upon it. Here *James England* did not leave his father his executor, but died intestate, leaving his father his heir, and leaving him also his sole next of kin and entitled as such sole next of kin to the personal estate of his deceased son. The question is, in what sense was he so entitled. It is

(a) Cited 1 Y. & C. 701. (b) 1 Y. & C. 688. (c) 5 Mad. 96.

1855.
 BOND
 " .
 ENGLAND.
 —
Judgment.

argued that he was only entitled to so much of that personal estate as might remain after payment of all the debts of his son, including the debt due upon this mortgage. A singular part of the case is, that the real estate descended to him charged with the mortgage debt, and at the same time he became entitled as next of kin to the personalty, of which, as against every one except himself as heir, and except the mortgage creditor, in case his security proved deficient, he was entirely the owner. But there arises a difficulty when no administration is taken out in cases circumstanced like this,—and the same kind of difficulty might even arise in the case of an executor. If an executor, being also devisee of leaseholds, were to die without having assented to the devise to himself (which all the authorities hold to be necessary in order to make it part of his own personal estate) the administrator de bonis non would take the leaseholds as part of the personalty of the original testator. *Edward* here died before taking out administration to *James*. Suppose he had administered and not assented to the leaseholds vesting beneficially in himself, then on *Edward's* death the leaseholds would have gone to the administrator de bonis non of *James*. But here *Edward* never even administered, and though it was his personal estate, as laid down in *Viner* (a), so far as to entitle his representative to letters of administration, still those letters were letters of administration of the effects, not of *Edward*, but of *James*, the original intestate, and subject to the duty of proving for all *James's* debts and liabilities. In that state of things a question, which seems to me to be one of some nicety, might arise. It is perhaps only trying idem per idem, but the consequence is somewhat startling. Suppose a claim made by a creditor of *Edward* the second intestate, the answer would be—'This is not *Edward's* personal estate in any sense until the debts of *James* the first intestate are all paid.' Suppose the mortgagee had sold after the death

(a) *Abridgement*, tit. "Executors."

of the mortgagor, and realised sufficient to pay his debt and handed over the surplus to be disposed of, the question would be whether the creditors of *Edward* are to remain unpaid altogether, the heir of *James* saying, 'Before those assets reach *Edward*, they must be applied to pay *James*' debts, and you cannot touch them until that debt is paid.' That seems a startling position; and yet, on the other hand, the creditors of *Edward*, the second intestate, could never apply for payment of their debts to the administrator de bonis non of *James* the first intestate, but only to the administrator of their own debtor. So that it comes back to this question, namely, whether the administrator of *Edward* could take property out of the hands of the administrator de bonis non of *James*, until all the debts of *James* are paid. Clearly if the security were insufficient he could not.

1855.
BOND
v.
ENGLAND.
Judgment.

Whether that makes any difference or not, it appears to me, that the authorities which have decided that when the same person who is heir or devisee of the mortgaged estate is also executor and residuary legatee, and has both the funds and the legal right to pay himself, his heir is not entitled to have the mortgaged estate exonerated, do not go far enough to enable me to hold that the administrator of *Edward*, who was entitled only to so much of the entire personalty of *James* as fell to him by the effect of intestacy, after all the debts of *James* were paid, can claim *James*' personalty until the mortgaged debt is discharged; or to hold, even if the mortgagee had chosen to sell the security, so that the debt had been in a manner discharged, that the defendant, claiming as heir of *James* as well as of *Edward*, has not a right to say 'The personalty of *James* never came to *Edward*, it remains unadministered, and I am entitled to have it applied in relieving the mortgaged estate from *James*' debt.'

The case is new in this particular. The views on the general doctrine have been very various; but the latter de-

1855.
 BOND
 v.
 ENGLAND.
 —
 Judgment.

cisions have proceeded upon the ground that the same party had both funds under his control. I cannot say that this was the case here, and I must therefore decide in favour of the Defendant, who applies to have the mortgaged estate exonerated.

DECLARE, that the personal estate of *James England* is liable, as between the Plaintiff and Defendant, to be applied in discharge of his mortgage debts in exoneration of his real estate charged therewith.

Nov. 17th,
 19th, & 22nd.

THORNE v. KERR.

Bond Creditor—Stat. of Limitations—Devastavit.

A. executed a money bond, binding himself and his heirs, and died in 1794, leaving B., his heir and executor, to whom real and personal assets devolved, sufficient to satisfy the bond. B. paid interest on the bond during his life. He died in

SIR HENRY VANE executed a bond, dated the 12th of March, 1793, whereby he bound himself, his heirs, executors, and administrators, to pay to *Eleanor Vane*, her executors, administrators, or assigns, the full sum of 7000*l.* of good and lawful money of *Great Britain*, on the 12th day of September then next ensuing, with interest for the same after the rate of 4*l.* per cent. per annum.

The condition of this bond was broken previously to the decease of Sir *Henry Vane*, and after the breach thereof he agreed to pay interest at the rate of 5*l.* per cent. per annum on the principal.

Sir *Henry Vane*, in his lifetime, paid interest on the said bond and also paid off part of the principal.

1813, leaving his widow C. his executrix and general legatee and devisee. C. paid interest on the bond down to February, 1817. In May following, she married D., who paid the interest and part of the principal due on the bond during the coverture, which was determined in June, 1834, by the death of C., and he afterwards paid the interest down to his own death. C. by will, under a power of appointment, gave to D. a life interest in her real estate, and he took out administration to her with her will annexed. D. died in May, 1852, leaving E. his executor. Subsequently, the bond creditor took out administration de bonis non to A., B., and C., and filed a bill against E. and the devisees of C., seeking to obtain payment out of the real and personal estate of C.:—*Held*, that the claim of the bond creditor against C. personally was a claim on simple contract only as for a devastavit, and was therefore barred by lapse of time.

Eleanor Vane died on the 13th day of February, 1818, having by her will bequeathed all her personal estate to the Plaintiff *Anne Thorne*, and appointed her sole executrix of her said will.

1855.
THORNE
v.
KERR.
—
Statement.

Sir *Henry Vane*, the obligor, by his will devised and bequeathed real and personal estate to his son Sir *Henry Vane Tempest*, subject nevertheless to the payment of his debts and funeral expenses and the legacies thereinbefore given; and he appointed his wife *Dame Frances Vane* and his said son Sir *Henry Vane Tempest* executors of his will.

• Sir *Henry Vane* died on the 7th day of June, 1794.

Sir *Henry Vane Tempest* was the son and heir-at-law of Sir *Henry Vane*, and he survived his co-executor the said *Dame Frances Vane*, and he duly paid interest upon the bond from the death of Sir *Henry Vane* down to the day of his own death.

On the 25th of April, 1799, he intermarried with the Countess of *Antrim*, who under the will of her father became entitled to one undivided third part of the estates of her father for an estate tail in possession. She and her husband afterwards barred the entail in these estates and limited the estate to him in fee.

Sir *Henry Vane Tempest* by his last will, after giving certain pecuniary legacies as therein mentioned, gave and bequeathed to his wife the said Countess of *Antrim* all his real and personal estate; and he appointed the said Countess and *William Hartley* executors of his will. He died on the 1st day of August, 1813.

The Countess of *Antrim* alone proved, and duly paid the

1855.
 THORNE
 v.
 KERR.
Statement.

interest from time to time accruing due on the said bond down to February, 1817.

On the 24th of May, 1817, she intermarried with *M'Donnell*; and previously to and in contemplation of such marriage *M'Donnell* entered into an engagement in writing duly signed by him, whereby he agreed that the said Countess of *Antrim* should, notwithstanding her intended coverture, have full power to devise her real estate.

By a post-nuptial settlement the estates were limited to *M'Donnell* for life; and a power was given her to raise 16,500*l.*, to be applied in payment of the debts of the said Sir *Henry Vane Tempest*.

By her will the Countess appointed that her trustees therein named, with the consent of *M'Donnell*, should make sale of all such parts of the said hereditaments (except as therein mentioned) as should be sufficient to pay all the debts or incumbrances charged on the said hereditaments at the time of her decease; and subject to the trust aforesaid, the said testatrix directed the said trustees to settle the said hereditaments to their use for a term of 1000 years, to be computed from the decease of the survivor of the testatrix and *M'Donnell*, upon trust, amongst other things, by cutting timber, to raise money for payment of the mortgage debts, sums of money, and other incumbrances, which should be a charge thereon, with remainder to the use of *Charles Fortescue Kerr* for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of the said *Charles Kerr* in tail male, with divers remainders over.

The Countess of *Antrim* died on the 13th of June, 1834.

After her death, letters of administration de bonis non

with the will of Sir *Henry Vane*, the first testator, annexed, and also letters of administration of the goods and effects of Lady *Antrim*, were granted to *M'Donnell*.

1855.
THORNE
v.
KERR.
Statement.

M'Donnell paid the interest on the bond from his marriage down to the time of his death.

M'Donnell died on the 19th of May, 1852, having by his will appointed the Defendants, Lady *Louisa Kerr* and *John Gregson*, his executors. Since his death, administration de bonis non, with their wills annexed, of the effects of Sir *Henry Vane* and Sir *Henry Vane Tempest* respectively, and also administration of the effects of Lady *Antrim*, were taken out by the Plaintiff *Anne Thorne*; but neither she nor her husband had received any assets of any of these persons.

The bill was filed by *Anne Thorne* and her husband against *Louisa Kerr* and *John Gregson*, and the persons entitled to the real estates of the Countess of *Antrim*. It charged that this suit ought, so far as it is necessary to be taken as a suit by the Plaintiffs on behalf of themselves and the other unsatisfied creditors of the said Sir *Henry Vane Tempest*, and of the said Sir *Henry Vane*, and of the said *Anne Catherine* Countess of *Antrim*, and of the said *Edmund M'Donnell*.

And the bill prayed a declaration that the said bond debt was a specialty debt, due and owing from the estate of Sir *Henry Vane Tempest*, and, if necessary, also from the estate of the Countess of *Antrim*; and that proper accounts might be taken of the real and personal estate devised and bequeathed by Sir *Henry Vane Tempest* and the real estate devised as aforesaid by the Countess of *Antrim*; and that due provisions might be made for the payment thereof of the principal and interest remaining due on the said bond; and that the personal estate of Sir *Henry Vane* come

1855.
 THORNE
 v.
 KERR.

to the hands of the said *John Gregson* and *Lady Louisa Kerr*, might likewise be applied in payment of the said bond so far as the same would extend.

Statement.

The question was, whether the real and personal estates of the Countess of *Antrim* were liable for the bond debt.

It was proved that *M'Donnell* and his wife, the Countess of *Antrim*, paid to the Plaintiffs 700*l.*; and that, in July, 1835, *M'Donnell* paid them a further sum of 1000*l.*, on account of the principal of the bond.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Giffard*, for the Plaintiffs.

Lady *Antrim's* real, as well as her personal, estate, is liable to this bond debt.

Sir *Henry Vane Tempest*, being the heir of his father, was bound by the bond, and the action against him would be in the debet and detinet: *Vin. Abr.* tit. "Heir," K. 2, pl. 8; he would be personally liable. Therefore, the Countess of *Antrim* would be liable, under 3 & 4 W. & M. c. 14, to the extent of the real assets which she took from him. But further, Sir *Henry Vane Tempest*, by his acts, admitted that he had possessed assets of his father to pay this bond debt, and Lady *Antrim* received from him assets liable to this bond debt. She must be taken to have admitted assets by paying from time to time the interest: *Corporation of Clergymen's Sons v. Swainson* (a): for the payments made after her marriage by her husband were for this purpose payments by herself; and as she died since the passing of the stat. 3 & 4 Will. 4, c. 104, her real as well as her personal estate are liable.

(a) 1 Ves. sen. 75.

1855.
 THORNE
 v.
 KERR.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case may be shortly stated thus: Sir *Henry Vane* gave a bond to a lady whom the Plaintiff represents. He died several years ago, having appointed his son and heir-at-law Sir *Henry Vane Tempest* his executor, and having left considerable real estate, which descended to Sir *Henry Vane Tempest*. The latter continued to pay interest on the bond, and made some payment in respect of the principal, and died, leaving Lady *Antrim* his widow and executrix; and she, acting as such executrix, received his personal estate, and also took considerable real estate by devise from him, which had originally been conveyed to him by her; and afterwards she married *M'Donnell*; and a settlement was executed by which a power was given to her to devise and appoint this estate as she thought fit. She subsequently died, not quite twenty years before the filing of the bill, having paid interest on the bond down to about February, 1817. Her husband is her representative. He has since died, and administration has been taken out by the Plaintiffs to Lady *Antrim*, Sir *Henry Vane Tempest*, and Sir *H. Vane*. The first two Defendants are the personal representatives of *M'Donnell*.

The question is, how far the real estates of Lady *Antrim*, under these circumstances, can be affected by the claim to this bond debt.

I have come to the conclusion that Sir *H. Vane Tempest* took sufficient real estate by descent from his father to pay this debt; and I intimated before, that, under these circumstances, I was of opinion that he was bound by the bond as heir to his father, being liable under the statute 3 & 4 Will. & Mary, c. 14, to an action upon the bond to the extent of the assets descended to him. At the time of his death, I considered that he was not a specialty debtor, as upon a bond which would bind his own real estate, but

that the debt was a debt against his personal estate, which, as I then understood, had been exhausted; and if that had been so there would have been an end of the case, as I had come to the conclusion, that his own real estate, as distinguished from the descended estates, could not have been affected. That fact, however, was not admitted, and accordingly an argument again arose as to whether or not the Countess of *Antrim* and her real estates could be made liable to this debt.

1855.
THORNE
KERR.
Judgment.

I think that there has been a fallacy in the very able argument which I have heard in support of this view. It was urged, that if the Statute of Limitations were admitted to be out of the question, the bond creditor might file a bill to have the bond debt paid; and if he could shew that interest had been paid thereon within twenty years, according to the ordinary course of the Court, the Court, in taking the account, would take an account of the assets received by each of a series of successive representatives of the original obligor through any devolution of the representation; and that when any representative was shewn to have received assets, the creditor might have a remedy against the real as well the personal estate of such person since the stat. 3 & 4 Will. 4, c. 104, which has made real estate of a deceased debtor answerable for his simple contract debts.

It struck me during the argument, that the fallacy was this:—If a creditor files a bill in respect of a specialty or simple contract debt, there are two courses open to him: he may file the bill on behalf of himself and all other creditors, either of the original debtor, or of either of his successive representatives whose estate he may choose to fix with the debt.

If the bill be on behalf of the Plaintiff and all the other creditors of the original debtor, the decree in such a suit

1855.
 THORNE
 v.
 KERR.
 Judgment.

would be for an account of his personal estate, and would trace the assets through the hands of his successive representatives; but with respect to the question of the Statute of Limitations, it is a very important consideration whom the creditor has chosen to treat as the principal debtor—whether the person against whose assets the bond-debt is still in force, or one of his representatives who has made himself personally liable to such bond-creditor. A case which illustrates this, is *Busby v. Seymour* (a). The circumstances there were, that one *Lennon*, having divided his property by will between his two children, appointed *Seymour* his executor, who took possession of the personal estate, and died possessed both of real and personal estate, and appointed his son *Thomas* his executor, and then the bill was filed by one of the children and her husband, who had obtained administration de bonis non to *Lennon*, not on behalf of the Plaintiff and all other creditors of *Seymour*, but in respect of their individual interest under the will of *James Lennon*; and it prayed that an account might be taken of the personal estate of *James Lennon* which came to the hands of *Seymour* deceased, or without his wilful default might have been received by him, and that the Defendant might admit assets sufficient to answer the demand of the Plaintiffs, or in default that the trusts of the will of *Seymour* might be carried into execution, and that an account might be taken of his freehold and personal estates.

A decree was made on that bill, simply directing an account of the assets received by *Seymour*, as executor, passing by the real estate, it not being the course of the Court, where a creditor sues singly, to make a decree as to the real estate. Some time afterwards, it was discovered in the Master's office, that nothing was to be got by that suit,

(a) 1 J. & L. 527.

1855.
 THORNE
 v.
 KERR.
 Judgment.

statute has seldom, if ever, been acted on, but the principle is plain—the remedy is founded on the devastavit of the executor, and if it is desired to affect his real estates a bill should be filed by the Plaintiff on behalf of himself and all the other creditors of that executor, founded on the devastavit; the bond is what leads up to the remedy, but the real foundation of the suit is the devastavit, as to which the remedy is barred by the lapse of six years, this Court following in that respect the analogy of the Courts of law.

In this case the Plaintiff has well filed the bill as on behalf of himself and the other creditors of Sir *Henry Vane Tempest*. Then there are statements all through to shew that other parties took the debt upon themselves; there is no mode of proving that except by shewing that they committed a devastavit; there is no consideration; nothing is stated to satisfy the requisitions of the Statute of Frauds respecting a promise to pay the debt of another, and if there were, even that would be barred by lapse of time. The relief to which the Plaintiff is entitled as a bond creditor of Sir *Henry Vane*, is to follow his assets through the hands of his successive representatives, according to the ordinary course of the Court. But then it may be argued, why could not any of the series of representatives set up the Statute of Limitations by shewing that a preceding representative had committed a devastavit more than six years ago. The course of the Court is to follow the assets as long as they are to be found; and if they are in existence, no question arises; but there might be a question in the case of an executor who should so defend himself, as to whose the debt was—though I think there can be no doubt how it would be decided. The question might arise between the specialty creditor of the original debtor, and the simple contract creditors of the intermediate executor—between them it would be a simple contract debt, and the Plaintiff could only come

in with the other creditors. But the question of the Statute of Limitations does not arise when the Plaintiff is merely seeking to affect the personal estate of the original debtor in this course of devolution and to take those assets, and those only which are in the hands of his representative, who has no defence for not treating them as the assets of the original debtor—but when the Plaintiff is seeking to attack the estate of the representative for his default, as to which the question must then be, what is the foundation of the claim? If the claim of the Plaintiff in this case be against the estate of the person who is represented by the Defendants, the answer is that she owed no specialty debt to the Plaintiff; his claim against her is one which at law would be simply the foundation of an action of devastavit, which cannot now be brought, being barred by the Statute of Limitations, and I am bound to follow that analogy and to hold that the remedy against the real estate of Lady *Antrim* is barred by lapse of time.

1855.
THORNE
v.
KERR.
—
Judgment.

DECLARE that not only the personal estate of Sir *Henry Vane*, the original obligor, but that of Sir *Henry Vane Tempest*, received by Lady *Antrim* as his personal representative, was liable to satisfy the moneys secured by and remaining unpaid in respect of the bond.

*Minute of
Decree.*
—

Inquire what is due for principal and interest on the bond.

Take an account of the personal estate of Sir *Henry Vane Tempest* received by Lady *Antrim*, and declare that what may be found due on such account is to be answered by the Defendants, *Gregson* and Lady *Louisa Kerr*, as personal representatives of Lady *Antrim* and *M'Donnell*, her late husband; and, if they do not admit assets, then take an account of the real estate of *M'Donnell*.

Inquire whether any personal estate of Sir *Henry Vane* has been received by *M'Donnell* in specie, and what has become thereof.

Dismiss the bill against the persons entitled to the real estate of Lady *Antrim*.

1855.

Nov. 23rd.

AUBIN v. HOLT.

Solicitor's Agreement—Retiring Partner—Name of Firm—Public Policy—Agreement to grant Annuity—Tender of Deed—Costs.

An agreement between two solicitors in partnership together, that one of them should continue to carry on the business under their joint names, and should be entitled to all the profits thereof, and should grant to the other partner an annuity of 300*l.*, during the life of his mother, and in the event of his dying in the lifetime of his mother, should pay to his widow an annuity of 100*l.* during the remainder

of his mother's life, and should indemnify him against all liability in respect of his name being used, and that the partnership should cease on the death of the mother of the retiring partner:—*Held* not to be void as against public policy, but to be a valid and binding agreement.

Held, also, that the agreement must be considered to mean, that an annuity was to be granted by deed, and that the retiring partner was entitled to enforce specific performance of such agreement.

Held, further, that, as incidental to such relief, the Court would decree an account and payment of the arrears of the annuity, and would not direct the deed to be ante-dated, so as to cover them, and leave the plaintiff to recover at law upon the deed.

Semble, that the Plaintiff ought strictly to have tendered a deed for execution before filing the bill; but, as it was proved that he had made a formal demand for the arrears,—*Held*, that he was entitled to his costs.

THE Plaintiff, *George Douglas Aubin*, and the Defendant, *Henry Frederic Holt*, being in partnership together as solicitors, on the 1st of September, 1848, entered into the following agreement:

"We do hereby declare and agree our mutual positions to be as follows: First. That all partnership accounts between us up to the 29th of July, 1846, have been duly closed and settled. Secondly. That since the 29th of July, 1846, the capital invested by the said *George Douglas Aubin* in our copartnership business has become and still is the sole property of the said *Henry Frederic Holt*. Thirdly. That from the said 29th of July, 1846, the said *Henry Frederic Holt* has been and still is entitled to the whole profits of the business carried on by him under the style of '*Holt and Aubin*.' That in consideration of this arrangement, the said *Henry Frederic Holt* shall, from the first day of October next, grant unto the said *George Douglas Aubin* a clear annuity of 300*l.* during the life of his mother Mrs. *Elizabeth Aubin*, he the said *George Douglas Aubin* paying thereout all interest now or hereafter to become due by him to Mr. *Clapham* or his assigns. That all arrears of the annuity of 150*l.* agreed to be paid to the said *George Douglas Aubin* by the said *Henry Frederic Holt*, accord-

ing to the agreement of the 29th of July, 1846, have been fully paid and satisfied. That in the event of the decease of the said *George Douglas Aubin* in the lifetime of his mother the said *Elizabeth Aubin*, the said *Henry Frederic Holt* shall pay to any widow the said *George Douglas Aubin* may leave him surviving an annuity of 100*l.* per annum during the life of the said Mrs. *Elizabeth Aubin*, on whose decease the said annuities to cease altogether. That, in the event of the decease of the said *Henry Frederic Holt* in the lifetime of the said Mrs. *Elizabeth Aubin*, the said *George Douglas Aubin* shall be entitled to receive the sum of 500*l.* in principal money out of the estate or property of the said *Henry Frederic Holt*, and to the entire profits of the business of the said '*Holt and Aubin*,' from the day of the decease of the said *Henry Frederic Holt*. That the said *Henry Frederic Holt* shall be permitted to carry on his business in the name and under the style of '*Holt and Aubin*,' he indemnifying and guaranteeing the said *George Douglas Aubin* from all liability in respect of his name being used as aforesaid. That at the decease of the said *Elizabeth Aubin*, the partnership between us to cease and determine."

1855.
AUBIN
v.
HOLT.
Statement.

Holt thereupon continued for some time to carry on his business of solicitor and attorney under the name and style of "*Holt and Aubin*." The annuity fell into arrear, and on the 17th of June, 1854, the Plaintiff's solicitors wrote to the Defendant, requesting payment of the arrears of the annuity, and execution of a proper deed, within fourteen days from that time; and intimating that if such request were not complied with, they were instructed to proceed to enforce it.

The Plaintiff did not tender any deed to be executed.

The bill prayed that the Defendant might be ordered by deed or otherwise to effectually grant and secure to the Plaintiff an annuity of 300*l.*, according to the terms of the

1855.
 {
 AUBIN
 v.
 HOLT.
 —
Statement.

said agreement; and also to duly and effectually indemnify and guarantee the Plaintiff from all liability in respect of such use of his name as aforesaid, and any further use thereof, and otherwise specifically to perform the said agreement on his part (the Plaintiff offering to perform it on his part), and for an account and payment of what was due to the Plaintiff from the Defendant in respect of the said annuity or otherwise under the said agreement.

Argument.
 —

Mr. *Rolt*, Q. C., and Mr. *Roberts* for the Plaintiff.

This agreement is not in itself a grant of an annuity. No action at law would lie upon it, for an annuity cannot be granted inter vivos without deed: *Re Locke* (a). The annuity, being for life, is of the nature of a freehold, and therefore can only be granted by deed.

Mr. *Willcock*, Q. C., and Mr. *H. Prendergast* for the Defendant.

The agreement amounts to a grant, and the proper remedy is by an action at law, and there is therefore no remedy in this Court: *Bensley v. Burdon* (b).

But if not, this is not such an agreement as this Court will decree to be specifically performed; for it is illegal, because it contemplates the retirement of the Plaintiff from the partnership, leaving his name in it as an inducement to people to deal with the Defendant: *Bunn v. Guy* (c), *Candler v. Candler* (d), *Thornbury v. Beville* (e).

Then there is no claim for an account; for the items of

(a) 2 Dowl. & Ry. 603.

(d) Jac. 225.

(b) 2 S. & S. 519.

(e) 1 Y. & C. C. C. 554.

(c) 4 East, 190; 1 Smith 1.

account are all on one side, and there are no mutual liabilities: *Foley v. Hill* (a).

The Plaintiff before suing ought to have tendered a deed to be executed, which he has not done.

1855.
AUBIN
v.
HOLT.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Judgment.

The last point, as to the tender of a deed, only affects the question of costs.

The Plaintiff is entitled to have this agreement performed, for the agreement itself is in terms to grant an annuity, and is not such an instrument as he is entitled to have to secure the annuity. For this purpose the Plaintiff is entitled to have a deed, and ought not to be left to his remedy at law upon this agreement, which may well be taken not to be an agreement to pay the annuity.

With respect to the objection on the ground of public policy, the first observation on Lord *Eldon's* judgment in *Candler v. Candler* (b) is, that it is in favour of this claim in one respect. He says that he had doubted the legality of similar arrangements, but was happy to find the Court of King's Bench to be of a different opinion in *Bunn v. Guy* (c), though he never could entirely reconcile himself to their doctrine; and that it was one of the commonest things in the world, as I believe it is to this day, for a solicitor to retire from a firm leaving his name in it. The case of *Thornbury v. Bevill* (d) was of a different character. There a person, who had never been in the firm before, was brought in upon the retirement of one of the partners, under the name of the retiring partner; and being entirely a

(a) 1 Ph. 399.

(b) Jac. 225.

(c) 4 East, 190.

(d) 1 Y. & C. C. C. 554.

1855.
 AUBIN
 v.
 HOLT.
 —
Judgment.

stranger in the business, he was allowed to use the name of an experienced person to launch him in the world, never having had any connexion with such person previously. That is a very different transaction from one partner in a firm retiring, and the name of the firm remaining unchanged.

The agreement must be legal or illegal, and it is not within the discretion of the Court to refuse specific performance, because an agreement savours of illegality. It must be shewn to be illegal.

As to the account, the Plaintiff has a right to have it taken as incidental to the other relief; and this Court is not bound, instead of taking the account, to direct the deed to be ante-dated so as to include the arrears of the annuity.

With respect to the effect of the omission to tender a deed for execution upon the costs, I must hear the reply.

Mr. *Rolt*, Q. C., in reply upon this point.

VICE-CHANCELLOR:—

Upon this point of the tender I should have thought that the Plaintiff, by omitting to make it, had forfeited his right to costs; but before instituting this suit he asked the Defendant also to pay the annuity; and it was his duty to take some step to do this, and his failing to do this has made this suit necessary. On that ground only I think the Plaintiff is entitled to costs.

*Minute of
 Decree.*

TAKE an account of the arrears. Decree payment, and the execution of a proper deed, to be settled in Chambers if the parties differ.

1855.

SIMPSON v. MORLEY.

Dec. 4th & 5th.

ON the 4th day of August, 1848, *George Binks* recovered judgment in an action in the Queen's Bench against *Francis Morley*, for 738*l.* 19*s.*, besides his costs of suit, which were taxed at the sum of 37*l.* 3*s.*, and such judgment was duly entered up.

2 & 3 Vict. c. 11—Creditors—Right against Lands—Judgment—Registration.

On the 5th of August, 1848, *John Clayton*, *Mathew Clayton*, *William Dunn*, and *John Bailey Langhorne*, recovered judgment in an action in the Queen's Bench against the same *Francis Morley*, which was afterwards duly entered up for the sum of 252*l.* 7*s.* 5*d.*, and costs of suit, together with interest from the day of entering up such judgment.

The provision of the 2 & 3 Vict. c. 11, s. 4, that all judgments shall, after the expiration of five years from the entry thereof, be null and void against lands, tenements, and other hereditaments as to creditors, unless re-registered within five years before the right of such creditors accrued, refers only to creditors who have some right or interest in such lands, tenements, or hereditaments, as, for example, by virtue of a creditors' decree, directing a sale of such property.

On the 5th of August, 1848, these two judgments were registered in the Common Pleas, and on the 12th of the same month they were also registered in the county of *York*, where the judgment debtor had some property.

Francis Morley died on the 3rd of August, 1854, intestate, and letters of administration of his estate were granted to the Defendant.

At the time of his death he was possessed of leasehold property in *Yorkshire*.

On the 23rd of November, 1854, the two judgments were re-registered at the Common Pleas.

Creditors of a deceased debtor have not, on his death, a right

against his leasehold property, in the hands of his executor or administrator, within the meaning of this Act.—*Quære*, if they have, even after a creditors' decree, any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors.

In re Perrin, 2 Dru. & War. 147, distinguished.

1855.
 SIMPSON
 v.
 MORLEY.
 —
Statement.

On the 30th of November, 1854, a creditors' suit was instituted to administer the estate of *Francis Morley*, and on the 2nd of December, 1854, the usual creditors' decree was made in that suit.

On the 25th of January, 1855, the Plaintiff, under a power of attorney for that purpose given him by the said judgment creditors, filed the bill in this suit, against the administratrix of *Francis Morley*, to realise the judgment debts by sale of the said leasehold property.

Argument.
 —

Mr. *Rolt*, Q. C., and Mr. *J. H. Palmer*, for the Plaintiffs. —The statutes 1 & 2 Vict. c. 110, ss. 13 and 19, and 2 & 3 Vict. c. 11, s. 4, are the enactments specially relating to this question. The creditors mentioned in s. 4 of the latter Act must mean creditors upon the real estate, not creditors only of the owner of it. Neither a simple contract nor a specialty creditor has any lien or charge of any kind upon the estate until he obtains a decree or judgment. In *Nugent v. Gifford (a)*, the executor had assigned a mortgage for a term of years, belonging to the testator's estate, in satisfaction of a debt of his own, and Lord *Hardwicke* says, "The question is, if the two daughters, who are allowed to be creditors, are entitled to follow this mortgage term (in the hands of the Plaintiff as assignee of it) as specific assets. I am of opinion they are not; but that the Plaintiff is entitled to the benefit of such assignment by the executor. At law the executor has power to dispose of and alien the assets of the testator; and when they are aliened no creditor by law can follow them—for the demand of a creditor is only a personal demand against the executor in respect of the assets come to his hands, but no lien on the assets."

In *Beavan v. Lord Oxford (b)*, recently decided in the

(a) 1 Atk. 463.

De Gex, M'Naghten, and

(b) To be reported by Messrs. Gordon.

Court of Appeal, *A.*, a judgment creditor, had registered, and then *B.*, another judgment creditor, registered within five years after the registry by *A.*: then five years since *A.*'s registry expired, and after an interval, *A.* re-registered; and then there arose a contest as to priority between *A.* and *B.*; and the Court decided, that as against *B.* the effect of *A.*'s first registration was never lost, and that *A.* had priority over *B.*

1855.
SIMPSON
v.
MORLEY.
Argument.

Then in this case the Plaintiff's judgments were also registered in *Yorkshire*, and that gives him priority independently of the registry at the Common Pleas. It was decided by Lord *Cranworth*, in *Johnson v. Holdsworth (a)*, that registry of a judgment at the Common Pleas did not compensate for want of registry in *Yorkshire*, so that a creditor by a judgment registered both in *Yorkshire* and *London* filing a bill to redeem a prior mortgagee and foreclose the mortgage, need not make parties persons who had subsequent judgments registered in *London* but not in *Yorkshire*. [VICE-CHANCELLOR.—It is impossible to say that a judgment registered in *Yorkshire* is excepted from the operation of the Acts for the registration of judgments. They require every judgment to be registered, and to be re-registered within five years.]

Mr. *James*, Q. C., and Mr. *Cairns*, for the Defendant.—The creditors mentioned in the stat. 2 & 3 Vict. c. 11, are creditors of the person, and not necessarily creditors having a charge on the land. *In re Perrin (b)* decided that the word creditors, in a similar provision of the 3 & 4 Vict. c. 105, included simple contract creditors, for the purpose of saving to them a right which they had by 6 Will. 4, c. 14, s. 126, to come in *pari passu*, under a commission of bankruptcy, with a judgment creditor whose judgment had been obtained by confession.

(a) 1 Sim. N. S. 106.

(b) 2 Dru. & War. 147.

1855.
 SIMPSON
 v.
 MORLEY.
 Dec. 5th.
 Judgment.

Mr. Rolt, Q. C., in reply.

Judgment was reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I delayed giving judgment in this case because I wished to consider the decision of Lord *St. Leonards* in the case which was cited, *In re Perrin* (a). I think that case raises no valid objection to the construction contended for by the Plaintiff in this suit. Independently of that case, I entertained no doubt upon the construction of the stat. 2 & 3 Vict. c. 11. That statute directs that all judgments registered pursuant to the provisions of the 1 & 2 Vict. c. 110 shall, after the expiration of five years from the former registration, "be null and void against lands, tenements, and other hereditaments, as to purchasers, mortgagees, or creditors."

From that part of the statute it is clear, that an unregistered judgment is not to be void altogether, either against creditors or any one else. In an administration in this Court, for example, such a judgment creditor would have priority over creditors otherwise than by judgment. It is only as against the lands, tenements, and hereditaments of the judgment debtor, that the operation of the judgment is thus limited; and if it rested there, the necessary inference would be, that the creditors intended by that Act must be creditors who have an interest in the land. The meaning must be, that the judgment is not to be void altogether if not registered, but only in a conflict between the judgment creditor and other creditors having an interest in the land.

But the further provisions of the Act make the construction plain. It continues, "unless a like memorandum or minute as was required in the first instance is again

(a) 2 Dru. & War. 147.

left with the Senior Master of the said Court of Common Pleas within five years before the execution of the conveyance, settlement, mortgage, lease, or other deed or instrument vesting or transferring the legal or equitable right, title, estate, or interest in or to any such purchaser or mortgagee for valuable consideration, or as to creditors within five years before the right of such creditors accrued, and so totiesquoties at the expiration of every succeeding five years."

1855.
 SIMPSON
 v.
 MORLEY.
 Judgment.

I think that the meaning of this is so clear, that no other construction is possible. The Act does not say five years before the creditor became such, but before his "right accrued;" and it is obvious what that right must mean, from the previous words of the statute, which refer, in the case of purchasers and mortgagees, to the execution of the deed or instrument vesting in them their respective interests. When the Act referred to creditors, it could not speak of a deed alone as giving them their rights, because such rights might attach under a bankruptcy or by a decree in this Court; but it must mean a right to the lands, and then the judgment must be registered within five years before such right accrued, in order to give it priority over such right. I agree with the argument, that the construction of the word "right" is, the right of the creditor to dispute the right of the judgment creditor; but the right intended is a right to the land.

Then when does a creditor acquire a right against leasehold property, which is the property sought to be affected in this case? Of course, during the life of the owner there is no question. After his death the creditor's right is simply this: he has no specific right against the leasehold or against any other chattel of the deceased debtor of which his executor may have taken possession. He has a right to sue the executor and to obtain a decree against him; and I should have considerable doubt, and I do not now deter-

1855.
 SIMPSON
 v.
 MORLEY.
 Judgment.

mine the point, whether, upon a common decree for an account, any right would attach upon the leaseholds or upon any specific chattel, unless the decree also directed a sale of such leaseholds or chattel. Before bill filed or before decree, he had no more right to leaseholds than to any other chattel—in other words, he had no right at all. He had only a right to see that the executor got in all the property, and applied it in payment of the debts. Suppose the executor had sold the leaseholds in order to pay the debts, an unregistered judgment is not void, but the judgment creditor could come in in priority to simple contract creditors in the administration of the proceeds of the sale. It was argued that an executor is a trustee in this Court, and if he improperly aliens the assets, this Court, at the suit of a creditor, will follow them into the hands of the assign, and will allow the creditor to fasten upon them. That would apply to any chattel, but it does not shew that a creditor has any lien upon specific parts of the assets. If he can shew that the executor has sold plate, for instance, to pay a debt of his own to a person who was aware of the fraud, the creditor may follow it.

I am bound to hold, that the statute 2 & 3 Vict. c. 11, does not admit of any other construction than that a judgment is null and void against the lands of the debtor in respect of any creditor who can assert a right against those lands, unless registered within five years before such right accrued. Here the judgment was re-registered within five years before the bill in the creditors' suit was filed.

In re Perrin (a) was a very different case. It was a question of construction of a statute upon words which seem so plain that I am not surprised that Lord *St. Leonards* said he had no doubt upon the point, and only re-

(a) 2 Dru. & War. 147.

served his judgment as to how far the previous statute, 6 Will. 4, c. 14, had affected the question. By that statute it was enacted, that a judgment creditor, who had obtained a judgment by confession, should be in the same position in bankruptcy as a simple contract creditor. There was an Irish Act which included in one clause several things which are more distributed in the corresponding Act relating to this country, and gave certain rights to the judgment creditor; and in that Act, after giving a judgment the effect of a charge upon land, this provision occurs: "nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom such judgment shall have been entered up, unless such judgment shall have been entered up one year at least before the bankruptcy: provided also, that, as regards purchasers, mortgagees, or creditors who shall have become such before the time appointed for the commencement of this Act, such judgment shall not affect lands, tenements, or hereditaments otherwise than as the same would have been affected by such judgment if this Act had not been passed;" and the very case had arisen of creditors under a bankruptcy, which was the case contemplated by the first part of the clause which I have read. The judgment creditor claimed to have certain rights in respect of a bankrupt's property, and urged that the simple contract creditors had no right to oppose, because the word "creditor" must be taken to mean persons who were like himself in the position of judgment creditors. Lord *St. Leonards* said, that was not so, for the preceding clause dealt with the case of creditors in bankruptcy. The bankruptcy was a statutory execution for the benefit of all the creditors by simple contract or otherwise equally, including judgments registered within a year before the bankruptcy and judgments obtained by confession. Any claim of priority by such judgment creditor was the mischief intended to be prevented. The Act provided, that every judgment creditor must regis-

1855.
 SIMPSON
 v
 MORLEY.
 Judgment.

1855.
SIMPSON
v.
MORLEY.

Judgment.

ter his judgment within a year before the bankruptcy; and as to creditors before the passing of the Act, judgments were not to affect lands at all. That statute did not admit of any other construction.

In like manner, I come, in this case, to the conclusion that the Act 2 & 3 Vict. c. 11, providing that an unregistered judgment shall be void against lands in respect of creditors, can only mean to refer to creditors having an interest in the lands. It provides that the judgment shall be void unless the judgment creditor re-register it within five years before the creditor's right accrued. That must be the right of the creditor in that thing in respect of which unless the re-registration is made the judgment is to be void, that is to say, "lands, tenements, and hereditaments." In so deciding, I construe the statute in the mode which the preceding words render necessary, as Lord *St. Leonards* did, in regard to the statute which he had to consider in the case I have referred to.

There must be the usual decree for payment or a sale.

1855.

THOMAS v. THOMAS.

IN 1814, *William Thomas*, the father of the Plaintiff, intermarried with *Dorothy Williams*, and, previously to and in contemplation of such marriage, a settlement was made, whereby one undivided fourth part of certain hereditaments, therein firstly and secondly described, was conveyed by the said *Dorothy Williams* unto and to the use of *Lloyd* and *Howell*, their heirs and assigns, subject to one fourth part of an annuity of 30*l.* issuing out of the same premises, and of a mortgage debt of 400*l.*, which was charged on the entirety of such premises; upon certain trusts as to the hereditaments firstly therein described, under which, in the events which happened, the said *William Thomas* became equitable owner in fee simple of such one-fourth of those hereditaments. And as to the hereditaments secondly therein described, in trust for the appointees of *Dorothy Williams*, notwithstanding her coverture, by deed or will: and in default thereof and subject thereto in trust for the said *Dorothy Williams* for life for her separate use; and from and after her death in trust for all and every the child and children of the said *Dorothy Williams* by the said *William Thomas* to be begotten, and their respective heirs and assigns for ever, if more than one, as tenants in common, and if but one for that one child, his or her heirs and assigns.

Infant's Estate
—*Bailiff*—
Statute of Li-
mitations—
Account of
Rents—*Mort-*
gage of Wife's
Estate—*In-*
quiry.

When a father has entered upon the estate of his infant children, the presumption is, that he entered as their guardian and bailiff, and therefore the Statute of Limitations does not begin to run against the children until they attain twenty-one, and from that time at least a child has twenty years within which he may recover possession:—*Seemle*, entry by a stranger might not have this effect.

William Thomas and *Dorothy* his wife by indentures of

If the father retain possession after the children at-

tain twenty-one, such possession will be considered to be continued in the character in which he entered, so that an account will be directed, not from the filing of the bill, but if necessary from the time of entry.

In an adverse suit, in the nature of an ejectment suit, against a person in no fiduciary relation to the Plaintiff, this account is only directed from the time of filing the bill.

If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use; and the Court will direct an inquiry as to this fact.

1855.
 {
 THOMAS
 v.
 THOMAS.
 — —
Statement.

lease and release and appointment, dated the 4th and 5th days of May, 1815, appointed and conveyed all the settled hereditaments and premises to the use of *Richard Richards*, his heirs and assigns, subject to one fourth part of the said annuity of 30*l.*, and likewise to one fourth part of the said mortgage debt of 400*l.*, and also subject to a proviso for redemption of the said premises, in case the said *William Thomas* and *Dorothy* his wife, or either of them, their heirs, executors, or administrators, or any or either of them, should pay to the said *Richard Richards*, his executors, administrators, or assigns, the sum of 600*l.*, with interest on the same after the rate of 5*l.* per cent. per annum; and *William Thomas*, for himself, his heirs, executors, and administrators, covenanted with the said *Richard Richards*, his executors and administrators, for payment of the said mortgage money and interest.

Dorothy Thomas died on the 25th of August, 1832, without having otherwise exercised her power of appointment; and upon her death her settled share became in equity divisible amongst her children by the said *William Thomas*, who were then living, and the representatives of those who had died in her lifetime, in equal shares as tenants in common in fee.

Dorothy Thomas had by her said husband eight children born alive, of whom the Plaintiff was one.

At the time of his mother's death all the children were infants, the Plaintiff being seventeen years old, and he attained the age of twenty-one years on the 21st of September, 1836.

William Thomas, the father of the Plaintiff, upon the death of his wife entered into possession of the said one undivided fourth part of the said settled hereditaments, and he continued in such possession until his own death, which

occurred on the 25th of August, 1852; and while in such possession he kept down the interest of the said 600*l.* advanced by *Richard Richards* on mortgage; and in 1818 *William Thomas* paid 100*l.* towards satisfaction of the mortgage debt of 400*l.* in the marriage settlement mentioned. The annuity of 30*l.* had long since ceased.

1855.
THOMAS
v.
THOMAS.
Statement.

The bill was filed against the executors and devisees of the real estate of *William Thomas*, and persons claiming under them, and against the other children of *William Thomas* and *Dorothy* his wife, praying for a declaration of the rights of the parties, and that the Plaintiff might be let into possession of the property, and that the 600*l.* and interest might be paid out of the assets of *William Thomas* in exoneration of the mortgaged estate.

Mr. *Daniel*, Q. C., and Mr. *C. Hall* for the Plaintiff.

Argument.

The Statute of Limitations has not barred the Plaintiff's claim, for the possession of his father must be taken to have been as bailiff for the Plaintiff during his minority. In *Morgan v. Morgan* (a) Lord *Hardwicke* said, "Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined;" and it was so held in *Blomfield v. Eyre* (b), where an account was decreed upon a bill filed by the person whose estate had been so held after he came of age. [The Vice-Chancellor referred to *Boddy v. Lefevre* (c).] *Wyllie v. Ellice* (d).

(a) 1 Atk. 489.

(c) 1 Hare, 602, n.

(b) 8 Beav. 250.

(d) 6 Hare, 505.

1855.
 THOMAS
 v.
 THOMAS.
 —
Argument.

The Plaintiff has a right to an account of the rents and profits at least from the death of his father. We do not ask for more. *Dormer v. Fortescue (a)*, *Hicks v. Sallitt (b)*.

The guardianship in socage would cease when the Plaintiff attained fourteen; but he may be presumed to have subsequently appointed his father his guardian until he should attain twenty-one, which may be done by parol.

The wife's joining in the mortgage was merely as surety for her husband, and therefore his estate is primarily liable to the mortgage debt (c).

Mr. *W. M. James*, Q. C., and Mr. *Cairns*, for Defendants in the same interest.

Mr. *Rolt*, Q. C., and Mr. *Renshaw*, for the devisees and executors of *William Thomas*.

The right of the Plaintiff is barred, for he has been of age more than ten years: 3 & 4 Will. 4, c. 27, s. 16. His right accrued on the death of his mother in 1832. The Plaintiff must prove that his father entered upon the land as bailiff, which is a question of fact, not a presumption of law.

The effect of the Statute of Limitations is, that when persons have had possession for the specified period of limitation, they may claim the land as their own, and any person trying to dispossess them must prove all the facts upon which he relies for that purpose. The circumstance that a different period of limitation is provided for an infant, namely ten years from attaining his majority, shews that the entry of another person upon his lands during his infancy is not always as bailiff; for if it were, the infant

(a) 3 Atk. 124, 134.

(b) 3 De G., M'N. & G. 801.

(c) See *Hudson v. Carmichael*,
 Kay, 613.

ought to have twenty, not ten, years after attaining majority, before his right should be barred. The trustees of the settlement ought to have taken possession. Even if the father took possession lawfully during the life of his wife, his continuing in possession afterwards was adverse : *Doe dem. Parker v. Gregory* (a), *Scott v. Nixon* (b).

1855.
THOMAS
v.
THOMAS.
—
Argument.

The account of rents and profits should only be taken from the filing of the bill : *Pulteney v. Warren* (c).

The reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I do not accede to the argument, that, because an infant can treat any stranger who has entered upon his land as his bailiff, for the purpose of enforcing an account of the rents and profits received by such stranger, it therefore follows, that the infant may in all cases treat such stranger as a bailiff, for the purpose of escaping from the effect of the Statute of Limitations. I think that is open to considerable argument, especially as that statute provides that ten years only shall be allowed after the termination of the disability of infancy for the person who has attained majority to assert his rights, a provision which, it has been justly observed, must be rendered altogether nugatory, if it be held that in every case where a stranger enters upon an infant's estate he enters as bailiff; because, if that were so, time would not begin to run against the infant until he attained twenty-one.

Judgment.

But there is another principle which affects this case, namely, that possession is never considered adverse if it can be referred to a lawful title. An important authority on

(a) 2 Ad. & E. 14. (b) 3 Dru. & War. 388. (c) 6 Ves. 73.

1855.
 {
 THOMAS
 v.
 THOMAS.
 —
Judgment.

this point is *Doe dem. Milner v. Brightwen* (a), where a party who had taken possession of copyholds on the death of his wife, by an adverse title, lived more than twenty years afterwards, and it was then found that there was an old custom of the manor by which he had a right to curtesy, and therefore his possession was referred to that title which was consistent with the title of the other party.

In this case a father who had several children entitled to estates on the death of his wife, all the children being under age at that time, entered upon the estates. I am of opinion, that, *primâ facie*, unless there were strong evidence to the contrary, his entry must be taken to be on behalf of his infant children and as their natural guardian—the guardian in socage of the Plaintiff he could not be, for such guardianship terminates when the child attains fourteen years of age; but considering the right of the father as the natural guardian of the infant Plaintiff, and the practice of this Court in making allowances for maintenance, he having entered and received the rents and profits, and there being no evidence of his not having discharged the obligation imposed upon him of maintaining his children, remembering the fact that they were all under his own charge and were infants, I think that I must reasonably infer that the entry was an entry on their behalf and as their guardian, and was totally different from the case of a mere stranger entering upon property under similar circumstances.

Then it is said, that, though the entry might have been lawful in its inception, the retention of the property after the children attained twenty-one barred their right under the Statute of Limitations; but I think the better and sounder view here is, that, if this gentleman entered as guardian, this Court would never allow him to set up any other title to the estate. However, if it were set up, he

(a) 10 East, 583.

would be in a different position as to the statute from a stranger who had so entered. Then, assuming that he ceased to continue in the position which up to that time he had held as a father receiving the rents for his children, still the rights of the children would accrue for the first time when they respectively attained twenty-one, and each would have twenty years from such time to assert his rights, and therefore the statute has not barred such rights.

1855.
 THOMAS
 v.
 THOMAS.
 Judgment.

I am far from being unwilling to uphold to the fullest extent the Statute of Limitations—not only because it is part of the law of the land, but because stale claims ought to be discouraged ; but I think that when the statute is set up as a defence, and such defence fails, that is of all others a case for costs. I reserve for the present the consideration of the period from which the account of rents should be taken.

With respect to the mortgage for 600*l.*; in *Clinton v. Hooper (a)*, Lord *Thurlow* carefully considered the question as to the liability of the wife's estate; and he there intimates that it depends entirely upon the proof whether the wife or the husband received the mortgage money. There must, therefore, be an inquiry to whom and for whose use the 600*l.* raised by that mortgage was paid and applied.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Dec. 7th.

I have considered the question as to the time from which the account of rents should be directed to be taken. The rule is as I had supposed. In an adverse suit, in the nature of an ejectment suit, the account is directed only from the filing of the bill. In a suit against a person affected with a fiduciary character, the account is taken either from the original period, or, if the Court thinks fit,

(a) 1 Ves. jun. 173.

1855.
 THOMAS
 v.
 THOMAS.
 —
Judgment.

on account of laches, for six years only previous to the filing of the bill. This renders it necessary for me to give my opinion as to the character in which the possession of this property has been held; and I think the sounder view is, that the father was in possession until his death as guardian of his children, and therefore the account must be taken from his death. It is only a question of two years; but as I am obliged to decide it, I must direct the account to be taken from the death of the father.



May 28th,
 29th, & 30th;
 June 21st (a).

*Mortgage—
 Priority—No-
 tice—Conver-
 sion—Legal
 Estate—Ta-
 bula in nau-
 fragio.*

ROOPER v. HARRISON.

BY indentures, dated 1712, a term of 500 years in the manor of *Stoke D'Abernon*, to which the advowson of the parish church of *Stoke D'Abernon* was appendant, was created, and vested in *Cranmer* and *Gaville*.

First mortgage to *W.*, with power of sale, and declaration of trust of residue of moneys arising from the sale, for the persons entitled to the equity of redemption. Second mortgage to *R.* Third mortgage, without notice of the second, to *H.*, who was *W.*'s solicitor, and as such had possession of the deeds. Afterwards, other incumbrances. Then *W.* died, having devised mortgage and trust estates to *H.*, and appointed him and another executors. *H.* sold under the power, and conveyed the mortgaged estate, paid off *W.*'s mortgage out of the purchase-money, and retained the balance. Subsequently *H.*, for the first time, had notice of *R.*'s mortgage:—*Held*,

First, that *R.*'s omission to give notice did not give priority either to *H.* or to a subsequent incumbrancer, who gave notice before *R.*; the estate, though subsequently converted, being real estate when the securities were executed; and to real estate the rule, as to notice giving priority, does not apply.

Secondly, that since *R.* was not bound to give notice, his motives for abstaining from giving notice were, in the absence of fraud, immaterial; the rule being, that an equitable incumbrancer on real estate is not postponed by any absence of activity in asserting his rights, except such as amounts to participating in fraud, or to constructive fraud.

Thirdly, that if before the sale *H.* had the legal estate in the premises (and, as to part, *semble*, that he had), still, having since parted with it, his opportunity of using it as a *tabula in naufragio*, to protect his own charge, was gone; and that *H.*, having, as devisee of *W.*, paid off *W.*'s mortgage, held the surplus upon trust for the persons entitled to the equity of redemption; and though he might, before notice of *R.*'s mortgage, have paid the surplus to other subsequent incumbrancers, he could not be heard to say, he had appropriated it to himself.

(a) The report of this case has been delayed, in consequence of the Editor's being unable to procure the requisite papers at an earlier period.

In 1741, a term of 500 years in the same manor and advowson was created, and vested in *Willis* and *Bowling*, for securing a jointure rentcharge for *Elizabeth* the first wife of *Francis Vincent*, and portions for their younger children.

1855.
ROOPER
v.
HARRISON.
Statement.

Elizabeth Vincent died without issue in 1743; and in 1745 a term of 500 years in the manor and advowson was created and vested in the Earl of *Effingham* and *Willis*, upon trust for raising 6000*l.* portions for daughters and younger sons of the marriage then intended between *Francis Vincent* and *Mary Howard*, spinster, with a proviso for cesser of the term on performance of the trusts.

In 1768, a term of 600 years was created in the manor and advowson, and vested in Sir *Thomas Champneys* and *Willis*, upon trust to raise a sum not exceeding 12,000*l.*

In 1769, the manor and advowson were assigned by way of mortgage to *Neate*, for the residue of the term of 600 years, subject to the term of 500 years created in 1745, with a proviso for redemption on payment of 10,000*l.* and interest.

And the incumbrances were declared to have priority according to the dates of the instruments.

Investigation of the doctrine as to the protection afforded to an incumbrancer by means of the legal estate.

Attendant Terms—"All the Estate, &c."—*Merger*.

Two terms were created in the same manor, one of 500 years, in 1712, the other of 600 years, in 1768. In 1791 the latter was assigned to *A.*, to secure a mortgage debt; and by a deed of even date, the former was assigned to *B.*, as a trustee for *A.* *A.* died, having appointed *B.*, *C.*, and *D.*, his executors. In 1801, by a deed indorsed on the first assignment of 1791, and "made between *B.*, *C.*, and *D.*, executors of *A.*, of the one part, and *E.* of the other part," *B.*, *C.*, and *D.* assigned the premises, "and all the estate," &c. to *E.*, for the residue of the term of 600 years, subject to the equity of redemption:—*Held*, that the term of 1712, being held by *B.* in what must be deemed his own right, did not pass by force of the words "and all the estate," &c., and was not merged.

Advowsons Appendant—*General Words*.

In 1790, an advowson appendant to a manor was sold and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, ceased.—*Held*, that this did not sever the appendancy, and that the advowson passed by a subsequent release of the manor with general words.

1855.
 ROOPER
 v.
 HARRISON.
 —
Statement.

In 1790, *Vaillant* became the purchaser, and took an assignment of the advowson for the residue of the term of 500 years created in 1745. And, by a deed of even date, the residues of the two terms of 500 years, created in 1712 and 1741, in the advowson were assigned to *Norris* in trust for *Vaillant*.

In 1791, the manor, and such other of the premises comprised in the term of 600 years as then remained unsold, were assigned by *Neate* to *Ramsay* for the residue of that term, subject to redemption on payment of 10,000*l.* and interest. And, by a deed of even date, the hereditaments and premises comprised in the last-mentioned assignment were assigned to *Seton* for the residue of the term of 500 years created in 1712, in trust for *Ramsay*, his executors, administrators, and assigns, subject to redemption on payment of the 10,000*l.* and interest; and, in the meantime, in trust to permit the same term of 500 years to wait upon and attend the term of 600 years, and to protect the premises from intervening incumbrances. The same deed purported to contain an assignment by Sir *F. Vincent* of the term of 500 years created in 1745, but the deed was not executed by him.

By an indenture dated January, 1801, indorsed on the first-mentioned indenture of 1791, and made between *Coutts*, *Watherstone*, and *Seton*, therein described as executors of the will of *Ramsay* of the one part, and *William Rowe* of the other part; reciting the death of *Ramsay*, having first made his will and appointed *Coutts*, *Watherstone*, and *Seton* executors, and that they had all proved the will; *Coutts*, *Watherstone*, and *Seton*, in consideration of 10,000*l.* to them paid by *William Rowe*, assigned to *William Rowe* all the premises which, by the therein within-written indenture were assigned to *Ramsay*, with

the appurtenances, "*and all the estate &c.*" (a): Habendum to *William Rowe*, his executors, &c., for the residue of the term of 600 years, subject to the then existing equity of redemption.

1855.
ROOPER
v.
HARRISON.
—
Statement.

In August, 1801, the manor, subject to the term of 500 years assigned to *Vaillant*, and to the term of 600 years assigned to *Neate*, was limited to the use of *Hugh Smith* deceased, the father of the Defendant *Hugh Smith*, his heirs and assigns. The reversion of the advowson was not specially mentioned in the conveyance; but, as between the parties to the cause, it was assumed, that the words used included that reversion.

In September, 1802, *Hugh Smith* the father assigned the manor, with the usual general words for manors, to *Jones* and *Kindersley*, for a term of 500 years, by way of mortgage, to secure 4000*l.* and interest.

In 1803, in consideration of 1750*l.*, the advowson was assigned by the executors of *Vaillant* to the Defendant *Hugh Smith*, for the residue of the term of 500 years created in 1745, upon trust for *Hugh Smith* the father, his executors, administrators, and assigns, to be assigned and disposed of from time to time as they or he should direct or appoint. And, by the same indenture, the advowson was assigned by the executor of *Norris* to *Raymond Rowe*, for the residue of the term of 500 years created in 1712 and 1741 upon the like trusts.

In 1813, the manor and other the premises comprised in the mortgage to *William Rowe* were assigned by his executors to *General Wallis*, for the residue of the term of 600 years, subject to the then existing equity of redemption.

(a) *Sic* in the abstract admitted to be read in evidence.

1855.
 ROOPER
 v.
 HARRISON.
 —
Statement.

By an indenture, dated in 1820, and indorsed on the secondly above-mentioned indenture of 1791, the manor, and such of the premises comprised in that indenture as were assigned to *Seton*, were assigned by him to *John Smith*, for the residue of the term created in 1712, in trust for General *Wallis*, for better securing the 10,000*l.* and interest; and subject thereto, in trust for *Hugh Smith* the father, his heirs and assigns, and to attend the inheritance.

Hugh Smith the father died in 1831, having, by his will, in 1828, devised the manor and advowson upon trust to pay certain annuities, since discharged; and, subject to that trust, to the Defendant *Hugh Smith* for life, with remainder to *Hugh Wallis Smith*, the eldest son of the Defendant *Hugh Smith*, in tail, with remainder to the Defendant *Hugh Smith*, in fee.

In 1835, the Defendants *Hugh Smith* and *Hugh Wallis Smith* executed indentures of that date, and afterwards enrolled, whereby the manor and advowson were disentailed and were limited, subject to the annuities, to such uses as they should jointly appoint; and in default of and subject to any such appointment, to such uses as the same were limited to by the will of *Hugh Smith* the father.

By indentures of lease, appointment, and release, dated in 1840, and made between the Defendant *Hugh Smith* of the first part, *Hugh Wallis Smith* of the second part, the Defendants *Hugh Smith* and *Thomas Smith*, devisees in trust under the will of *Hugh Smith* the father, of the third part, General *Wallis* of the fourth part, and the Defendant *Charles Harrison* of the fifth part, in consideration of various sums previously advanced by General *Wallis*, amounting in the whole to 23,000*l.*, the Defendants *Hugh Smith*

and *Hugh Wallis Smith*, in exercise of the power limited to them by the indenture of 1835, appointed, and they and *Thomas Smith* released, the manor, but not in express terms the advowson, with the general words for manors(a): To the use of General *Wallis*, his heirs and assigns, subject to the mortgage for 4000*l.* and to the annuities, and subject to a proviso for reconveyance of the premises on payment of the 23,000*l.* and interest, to such uses as the Defendants *Hugh Smith* and *Hugh Wallis Smith* should appoint; and in default of and subject to any such appointment, to such uses as the premises then stood limited to. This mortgage contained a power of sale (a) and a declaration, that the residue, if any, of the moneys to arise from the sale, after payment of prior charges or incumbrances, and the principal and interest due on the security of the now existing indenture, should be held in trust to pay the same to the persons entitled to the equity of redemption of the mortgaged premises.

1855.
ROOPER
v.
HARRISON.
Statement.

By an indenture, dated 1841, indorsed on the indenture of appointment and release of 1840, the hereditaments comprised in the last-mentioned indenture were charged with a further sum of 1500*l.* and interest, and the powers of sale were extended to secure the payment of the 1500*l.*; and, by the same indenture, *Hugh Smith* and *Hugh Wallis Smith* appointed the advowson to the use of General *Wallis*, his heirs and assigns, subject to a like equity of redemption as was then subsisting in the manor. And it was declared, that the provisos for redemption and powers of sale contained in the last-mentioned indenture should be applicable to and exerciseable with respect to the advowson.

By an indenture dated 1843, and which was afterwards enrolled, *Hugh Wallis Smith* granted and released the

(a) *Sic* in the abstract admitted in evidence.

1855.
 ROOPER
 v.
 HARRISON.
 —
Statement.

manor, with the general words for manors, but not in express terms the advowson (a), freed and discharged from his estate tail, and all remainders, &c., which he had power to bar, to the use of the Plaintiffs Messrs. *Rooper, Birch, & Ingram*, their heirs and assigns, subject to the life estate of the Defendant *Hugh Smith*, the mortgage debts of 4000*l.* and 23,000*l.* and interest, and the annuities; and subject also to a proviso for redemption on payment of 1300*l.* and interest.

By an indenture, dated 1846, the Defendants *Hugh Smith* and *Hugh Wallis Smith* appointed and released the manor and advowson to *Charles Harrison* and *Edward Harrison* (since deceased), their heirs and assigns, subject to the mortgage debts of 4000*l.*, 23,000*l.*, and 1500*l.*, and also subject to a proviso for redemption on payment of 6000*l.* and interest.

At the date of this mortgage, the Defendant *Charles Harrison* was solicitor of General *Wallis*, and, as such, had in his possession the title deeds of the mortgaged property.

Other mortgages were afterwards effected upon the estate as follows, viz. A mortgage dated the 15th of January, 1847, by *Hugh Wallis Smith*, to the Plaintiff *Whately*, for 500*l.*; a mortgage dated the 16th of January, 1847, by *Hugh Wallis Smith*, to the Plaintiff *Birch* for 200*l.*, to the Plaintiff *Rooper* for 105*l.*, to the Plaintiffs *Rooper Birch*, and *Ingram* for 100*l.*; a mortgage dated May, 1847, by *Hugh Smith* and *Hugh Wallis Smith*, to the Defendant *Charles Harrison* and *Edward Harrison* for 1450*l.*; a mortgage dated March, 1849, by *Hugh Smith*

(a) *Sic* in the abstract admitted in evidence.

and *Hugh Wallis Smith* to the Plaintiff *Rooper* for 2500*l.*; a mortgage dated July, 1849, by *Hugh Smith* and *Hugh Wallis Smith* to the Defendant *Livesey* for 500*l.*; and lastly, a further mortgage of 50*l.* in favour of the Defendant *Charles Harrison* by *Hugh Wallis Smith* in August, 1849.

1855.
ROOPER
v.
HARRISON.
Statement.

General *Wallis* died in August, 1848, having by his will, in March, 1848, devised all estates vested in him by way of mortgage to the Defendant *Charles Harrison*, his heirs, executors, administrators, and assigns, subject to the equities affecting the same; and having appointed the Defendants *Saint* and *Charles Harrison* his executors, by whom his will was proved.

On the 2nd of October, 1849, *Livesey* gave notice of his mortgage; and on the 11th of October, 1849, the Plaintiff *Rooper* gave notice of his mortgage of March, 1849, to the *Harrisons*.

By an order of the Court in March, 1851, it was ordered, *inter alia*, that *Stewart* and *Charles Harrison* should be appointed trustees of the indenture of 1802; and that the hereditaments comprised in the term of 500 years, created in 1802, should vest in *Stewart* and *Charles Harrison* for the residue of that term, subject to the existing equity of redemption.

Shortly afterwards, *Charles Harrison*, as devisee of General *Wallis's* mortgaged estates, contracted to sell the manor and advowson for 35,000*l.* By an order of the Court dated August, 1851, it was ordered that *Charles Harrison*, in the place of the Defendant *Hugh Smith*, should convey the advowson to the purchaser. And by an indenture dated April, 1852, to which *Charles Harrison*, *Saint*, and *Stewart* were parties, reciting the contract for

1855.
 ROOPER
 v.
 HARRISON.
 —
Statement.

sale, as having been so entered into by *Charles Harrison* under the powers of sale contained in the indentures of 1840 and 1841, and by the concurrent direction of *Saint* as his co-executor, the manor and advowson were conveyed to the purchaser in fee.

In this deed the purchase money was expressed to be paid, as to 4000*l.*, to *Stewart* and *Charles Harrison*, in satisfaction of the moneys owing on the indenture of 1802; and as to the 31,000*l.* to *Charles Harrison*, to be by him held and applied upon the trusts and in manner upon and in which the same sum was applicable and ought to be applied under the indentures of 1840 and 1841, taken in conjunction.

In May, 1853, *Rooper, Birch, Ingram, and Whateley* filed their bill against *Charles Harrison, Saint, Livesey, Hugh Smith, and Sturges* (the provisional assignee of *Hugh Wallis Smith*, who in 1851 became insolvent) praying, inter alia, a declaration that the surplus of the moneys received by the Defendants *Saint* and *Harrison*, after satisfaction of the incumbrances prior to the mortgage of 1840, and after satisfaction of what was due to them as executors of General *Wallis* at the time of the completion of the sale upon the security of the indentures of 1840 and 1841, ought to be applied in payment of the incumbrances created by the Defendants *Hugh Smith* and *Hugh Wallis Smith*, or either of them, subsequent to those indentures, according to the priorities of such incumbrances respectively.

It did not appear that the Defendants had notice of the Plaintiffs' mortgage of 1843 until the year 1853.

The Defendant *Harrison* by his answer submitted, that at the date of the sale the first legal estate in all the mort-

gaged premises was vested in him; and that as a mortgagee without notice, having the legal estate, and having possession of the title deeds of the mortgaged property, his mortgages and charges were entitled to priority over those of the Plaintiffs:—also that the Plaintiffs, on taking their securities from *Hugh Wallis Smith*, gave no notice of such securities to, and made no inquiries as to the incumbrances on the estates of the Defendant *Hugh Smith*, the tenant for life, and protector of the settlement, nor to or of General *Wallis* and the Defendant *Harrison*, as the persons in whom the legal estate in the hereditaments was vested, and who had possession of the title deeds, or either of them; but he believed the Plaintiffs purposely, and at the express request of *Hugh Wallis Smith*, refrained from giving such notice or making such inquiries, in order that it might not be known that *Hugh Wallis Smith* had been dealing with his reversionary interest in the estate, and in order that *Hugh Wallis Smith* might not be disabled from joining with the Defendant *Hugh Smith* in selling or mortgaging the estates.

1855.
ROOPER
v.
HARRISON.
Statement.

Mr. Rolt, Q. C., and Mr. R. Pryor for the Plaintiffs.

Argument.

The surplus of the moneys received by the Defendants, *Saint* and *Harrison*, after payment of what was due to them as General *Wallis's* executors, at the time of the completion of the sale of the mortgaged estates, upon the security of the indentures of 1840 and 1841, ought to be applied in payment of the incumbrances subsequent to those indentures, according to the dates of the several instruments by which such incumbrances were created.

No valid reason has been suggested by any of the Defendants to prevent the operation of the rule, that priority of date gives priority of charge.

1855.
 ROOPER
 v.
 HARRISON.
 —
Argument.

It is not the case, as stated by the Defendant *Harrison*, that, at the date of the sale, the first legal estate in the mortgaged premises was vested in him. As regards the manor at least, the term of 1712 had been left outstanding, and that circumstance alone reduced all incumbrancers to their priorities: *Maundrell v. Maundrell* (a), and the reference there made to Lord *Hardwicke's* decision in *Willoughby v. Willoughby* (b).

And even if the Defendant had the legal estate, he had it either as executor or as devisee in trust of General *Wallis*, and in either case not in his own, but *in alieno jure*; and therefore he cannot render it available as a *tabula in naufragio*, to secure moneys advanced out of his own pocket: *Barnett v. Weston* (c), *Morret v. Paske* (d).

Then, as to the possession of the deeds, the Defendant held the deeds, not for himself, but as the solicitor of General *Wallis*; and in any case the Plaintiffs are not chargeable with laches for omitting to obtain possession of deeds to which, as second mortgagees, they were not entitled.

As to the question raised with reference to notice, the rule requiring notice, whatever may be its policy, has never yet been extended to mortgages of real estate. At the date of the Plaintiffs' mortgage this property was real estate, and the Plaintiffs, as equitable incumbrancers upon real estate, were not bound to give notice: *Jones v. Jones* (e). The conversion of the property was not effected until after the Plaintiffs' mortgage, and could not alter their rights: *Bugden v. Bignold* (f). And if the Plaintiffs were not bound to give notice, the reasons for which they abstained from giving notice, fraud not being shewn to have been one, are immaterial.

(a) 10 Ves. 280.

(b) 1 T. R. 773.

(c) 12 Ves. 130.

(d) 2 Atk. 52.

(e) 8 Sim. 633.

(f) 2 Y. & C. C. C. 377, 392.

The Plaintiffs are also entitled to a declaration, that the advowson passed by their securities—those securities conveying the manor with the usual general words for manors. That the advowson would have passed by the word “appurtenances” alone is clear, since it was found necessary to pass an Act to declare, that where the Crown grants hereditaments to which an advowson is appendant, the word “appurtenances” shall not carry the advowson.—[They cited also *Macreth v. Symmons* (a) and *Brace v. Duchess of Marlborough* (b).]

1855.
 ROOPER
 v.
 HARRISON.
 —
Argument.

The *Solicitor General* and Mr. *Archibald Smith* for the Defendant *Harrison*.

The Plaintiffs' security of 1843, though prior in point of date, must be postponed in point of charge. For

First. The Plaintiffs omitted to give notice. This property is not real estate; it has been converted; and having been converted, and properly converted into money before notice of the Plaintiffs' security, the Court will consider the fund in the position in which it was found when notice was given, and will determine the question of priority of charge by the priority of notice: *Foster v. Blackstone* (c), *S. C.*, under the title of *Foster v. Cockerell* (d).

Even if the rule requiring notice were not strictly applicable, there has in this case been more than a mere omission to give notice. The omission has been intentional. The Plaintiffs have abstained from giving notice from an improper motive.

The Defendant, before he had notice of the Plaintiffs' charge, had appropriated the surplus in satisfaction of his

(a) 15 Ves. 328.

(c) 1 M. & K. 297.

(b) 2 P. Wms. 495.

(d) 3 Cl. & F. 456.

1855.
 ROOPER
 v.
 HARRISON.
 —
Argument.

own mortgage debt; and since payment by him to any incumbrancer subsequent in date to himself would, in the absence of notice, have been good, and not a breach of trust, *Wilmot v. Pike* (a), the appropriation of the money by the Defendant in satisfaction of his own debt must be good also. But

Secondly. If this estate is to be treated as being in the position in which it was before conversion, the Defendant's charge is still entitled to priority, upon the ground that the Defendant had the first legal estate.

That the Defendant had the first legal estate is clear, unless it can be shewn that the term of 500 years created in 1712 was left outstanding. But that was not the case. In 1791 the term of 1712 was assigned to *Seton* as trustee for *Ramsay*. In *Seton* also, upon *Ramsay's* death, and in his co-executors, the term of 600 years, created in 1768, was vested. [The VICE-CHANCELLOR.—Could the two terms coalesce, the one being vested in *Seton* in his own right, the other as *Ramsay's* executor?] Not in *Seton*; but the two could and did coalesce in *William Rowe*, to whom, in 1801, the latter term was assigned by *Ramsay's* executors, *Seton* being one, executing the assignment and conveying thereby "all his estate, right, title, &c. in the premises."

The term of 1712 having merged in that of 1768, which indisputably vested in the Defendant *Harrison*, the latter had the first legal estate in the manor; and as mortgagee without notice, having the legal estate, and having possession of the title deeds, his mortgages and charges were and are entitled to priority over those of the Plaintiffs.

It was argued that his possession, both of the legal estate

(a) 5 Hare, 21.

and of the title deeds, was alieno jure; but that this, as regards the legal estate, does not deprive him of his right to use it as a tabula in naufragio, is clear from *Wilmot v. Pike* (a),—a much stronger case, since there a trustee was allowed to tack advances of his own against an advance made by his cestui que trust; and, as regards the deeds, what good could have been gained by his delivering them to a third party, merely to receive them again in his own right (b)?

1855.
ROOPER
v.
HARRISON.
Argument.

With regard to the advowson, in 1790 it was severed from the manor by a sale to *Vaillant* for the residue of the term of 500 years created in 1745. It therefore ceased to be appendant and became in gross: Sheppard's "Touchstone," p. 90. And if an advowson be once in gross, it cannot afterwards by any act become appendant (Comyn's Digest, tit. "Advowson," B.); consequently, the reversion of the advowson did not pass by any subsequent conveyance, by which it was not expressly granted.

Mr. James, Q. C., and Mr. Giffard for the Defendant *Livesey*.

The Defendant *Livesey*, having been the first to give notice of his charge to the legal depositary of the fund, obtained priority, upon the principle decided in *Dearle v. Hall* (c), *Loveridge v. Cooper* (d), and *Foster v. Blackstone* (e), that, as between parties having equities only, he who first gives notice obtains priority, per Lord *Cottenham*, M. R., in *Peacock v. Burt* (f); a rule which, if there be no authority in the way, is upon every principle of sound policy equally applicable to real and to personal estate.

(a) 5 Hare, 21, 22.

(b) They cited also 3 Sugd. V. & P., 10th edit., 77.

(c) 3 Russ. 1.

(d) Id. 30.

(e) 1 M. & K. 297; S. C. 3 Cl. & F. 456.

(f) Reported in Coote's "Treatise on the Law of Mortgage," pp. 569, 572.

1855.

ROOPER
v.
HARRISON.
—
Argument.

Mr. *Osborne* for the Defendant *Sturges*.

THE VICE-CHANCELLOR:—

With regard to the point of notice, it is impossible to contend that this property was not real estate when the securities of the parties were effected,—at which time it was that their rights were ascertained; and if the property is to be treated as real estate, it is clear from authority—authority not confined to *Jones v. Jones (a)*—that the doctrine, that, as between equitable incumbrances, priority of notice gives priority of charge, has no application: *Dearle v. Hall* and *Loveridge v. Cooper* were not cases of real estate. And in *Foster v. Blackstone* the property, though originally real estate, had been converted before the date of the security in question, and was treated as personalty. But, independently of *Jones v. Jones*, and other authorities in the way of such a decision, nothing, I apprehend, would be more dangerous than to hold, at the present day, that wherever there is a power of sale, notice must be given by a puisne incumbrancer.



Then as to the argument founded upon the Plaintiffs having abstained, as was alleged, from giving notice from a bad motive: the Plaintiffs were either bound to give notice, or they were not; and if they were not bound to give notice, then, in the absence of fraud, the motive for which they abstained from doing so is immaterial.

If inconvenience results from the absence of a rule requiring notice in the case of real estate, it can only be removed by the legislature.

The reply, therefore, may be confined to the argument that the Defendant *Harrison* was entitled to priority as having the first legal estate in the mortgaged premises.

(a) 8 Sim. 633.

Mr. Rolt, Q. C., in reply.—*Barnett v. Weston* (a) was not cited in *Wilmot v. Pike* (b), and the reasoning upon which in the latter case *Wigram*, V. C., allowed the trustee to tack, is inconsistent with that in the former. Here, as in *Barnett v. Weston*, the third mortgagee did not get in the legal estate, but that estate vested in him (if at all) by devolution of law and by mere accident.

1855.
ROOPER
v.
HARRISON.
—
Argument.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

June 21st.
—
Judgment.

The question raised by this bill is one of priority as between the Plaintiffs in the suit, and the Defendants *Harrison* and *Livesey*, with respect to their charges upon certain estates which were limited to such uses as the Defendant *Hugh Smith* and his son *Hugh Wallis Smith* (now represented by *Sturges*, the assignee of the Insolvent Debtors Court) should appoint, and subject to that limitation, to *Hugh Smith* for life, with remainder to *Hugh Wallis Smith* in tail, with an ultimate reversion to *Hugh Smith* in fee.

The question arises in this manner:—By two indentures dated 1840 and 1841, the estates, which had been originally limited in the manner I have described, were appointed, in effect, to General *Wallis*, for the purpose of securing by the first deed 23,000*l.*, and by the second 1500*l.* In the first deed there was a power of sale, not stated fully in the abstract, but which I must assume to have been so worded that the deed of April, 1852, by which it purports to have been exercised, operated as a valid execution of the power. In reference to that power of sale, there was a declaration

(a) 12 Ves. 130.

(b) 5 Hare, 14.

1855.
 ROOPER
 v.
 HARRISON.
 —
Judgment.

as to the moneys raised by the sale, that, after discharging the principal moneys and interest, the residue should be paid to the persons entitled to the equity of redemption of the mortgaged premises. The property being in that state, several securities were executed subsequently—some by the son, some by the father and son. The first in point of date of those securities was effected by indentures dated August, 1843, by which *Hugh Wallis Smith*, the son, created a charge on his interest,—his estate tail in reversion, and enlarged that estate tail into a base fee,—he could do no more without the consent of the tenant for life,—and created a charge in favour of the Plaintiffs, *Rooper, Birch, and Ingram* for 1,300*l.* The next security in point of date is a mortgage by the father and son, dated in April, 1846, to the Defendants, *Charles Harrison and Edward Harrison*, for 6000*l.* I believe, in point of fact, it is not of much utility to inquire beyond those mortgages. I do not know how that may ultimately be, but as far as I understand at present the surplus will be exhausted by those two. [His Honour enumerated the subsequent mortgages, bearing date from the 15th of January, 1847, to August, 1849, as stated above, and proceeded:] So that the first charge, in point of date subsequent to General *Wallis's* securities,—a charge standing, however, only on the base fee,—is the 1300*l.* The next charge upon the whole premises is the 6000*l.* to the *Harrisons*, and then comes the series of charges to which I have referred. I should state, with regard to these charges, that *Livesey* gave notice of his charge on the 2nd of October, 1849; and that on the 11th of October, 1849, notice was given to the *Harrisons* of the Plaintiff *Rooper's* charge of 2500*l.* On the 10th of November, 1849, *Rooper* obtained judgment against *Hugh Wallis Smith*. On the 5th of January, 1850, he obtained judgment against *Hugh Smith*, and for some time he sequestered the living.

Now the first point argued for the Defendants was that

ntiffs, although their mortgage for 1300*l.* on the *Hugh Wallis Smith* was unquestionably prior in date to the Defendant *Harrison's* mortgage for having omitted to give notice, were postponed to her mortgage in respect of their interest in that I dealt with this argument before the reply, and I now only add, that I find the view taken by every the subject has been uniform; that the question which was raised in *Dearle v. Hall* (a) and *Love-*

Cooper (b), with respect to interest in personal has no application whatever to real estate. The parent exception is the case of *Foster v. Black-*, affirmed on appeal by the House of Lords under of *Foster v. Cockerell* (d), where, there being a diversion of the whole property, it was held that the property was to be treated as personal estate, and, it as personal estate, that the party who gave notice large obtained priority. In this case there is nothing r which converts the property into personal estate. a power of sale in the mortgagee, but that power exercised until long after all these charges had ated. The position, therefore, of the parties as to precisely that described by Vice-Chancellor *Knight* 1 *Bugden v. Bignold* (e), where he says, "Notwith-; the conversion of the copyhold into personalty by " (it was a subsequent sale,) "I think both upon e and authority (authority not confined to *Jones v. f*)) that the notices, as I have said, did not gain for rank which otherwise they had not. I think that ts of the Plaintiff were fixed by his security of 1838, e copyhold property was in every sense real estate at least, for every purpose that the circumstances resent case bring under consideration." In *Wilmot*

1855.
ROOPER
v.
HARRISON.
Judgment.

tuss. 1.

tuss. 30.

fyl. & K. 297.

(d) 3 Cl. & F. 456.

(e) 2 Y. & C. C. 392.

(f) 8 Sim. 633.

1855.
 ROOPER
 v.
 HARRISON.
 Judgment.

v. *Pike* (a), a case cited by the Defendants on another point, Vice-Chancellor *Wigram* fully adopted the same view, and stated that there was no rule by which you could apply the question of notice to real estate, the doctrine in equity being that in truth real estate passes by the conveyance. In the eye of the Court the estate itself passes by the mortgage to the equitable mortgagee, and his interest is completely secured by the conveyance. If this view be attended by any inconvenience, as I said before, it can only be remedied by the legislature introducing some system, by registration or otherwise, by which persons may have notice of the charges existing upon real estate. This estate was unquestionably real estate at the time all these securities were acquired.

It was next argued for the Defendants, that although the doctrine of notice might not in itself apply, there had in this case been something more than a mere omission of giving notice;—there had been, on the part of the Plaintiffs, an actual abstaining from giving notice for a purpose alleged to be improper; the Plaintiffs had so abstained from giving notice, at the request of the mortgagor, *Hugh Wallis Smith*, who stated, as the reason for his request, that he did not wish General *Wallis* to be informed of the incumbrance. I say nothing more on that point. Possibly some question might arise if General *Wallis* had been defrauded by the mortgagor in consequence; though I doubt whether it would be carried even to that extent, because, withholding notice where you are not bound to give any, cannot affect your rights. If it could be shewn that notice was withheld to enable the *Smiths* to raise more money, it would be a different case. But looking to all the authorities, some of which the Vice-Chancellor had before him in *Bugden v. Bignold*, when he said he did not rest on the case of *Jones v. Jones*—looking at the several cases cited

(a) 5 Hare, 14.

and other cases of that description, I apprehend it is quite clear that no mere absence of activity on the part of an equitable incumbrancer in asserting his rights, postpones his incumbrance. Nothing short of an absence of activity, amounting either to participating in fraud, or to such a course of dealing as the Court conceives must inferentially affect the party with the commission of fraud, could have this effect.

1855.
 ROOPER
 v.
 HARRISON.
 Judgment.

The case, therefore, is reduced simply to this : The Plaintiffs *Rooper*, *Birch*, and *Ingram* have a clear equitable priority in point of charge on the estates, unless they are to be affected by the question which was next raised of the legal estate being vested in the Defendant *Harrison*, who, as one of the subsequent incumbrancers, claims, in respect of his advances, priority over the charges created by the son, and afterwards by the father and son, in favour of some of the Plaintiffs.

I will first assume that the Defendant *Harrison* had the legal estate ; and considering the case in that view, I do not see how the doctrine of the legal estate being outstanding, and protecting a puisne equitable incumbrancer, who had acquired it without notice of the intervening incumbrance, can be applied to the case before me.

What were the rights of the parties up to the moment of the sale ? I will assume for the present that General *Wallis* had the legal estate, and that by devising all his estates in mortgage to the Defendant *Harrison*, one of his executors, and appointing the Defendants *Harrison* and *Saint* his executors, he passed to *Harrison*, not only the legal estate (if he had any) in the property, but the power of sale. That being so, the trustee advances further money.

In *Wilmot v. Pike (a)*—a case on which, however, I am not intending to throw any doubt — the circumstances

(a) 5 Hare, 14.

1855.
 ROOPER
 v.
 HARRISON.
 —
Judgment.

were stronger than they are here, against allowing the trustee to protect himself by setting up the legal estate, inasmuch as there the trustee was trustee of the first mortgage for the very person against whom he claimed to set up that legal estate; and being such trustee, he afterwards advanced money of his own, without knowing that his cestui que trust had made a second advance; yet in that case Vice-Chancellor *Wigram* said, inasmuch as if the party having a puisne incumbrance obtain a declaration by the party holding the legal estate that he will hold that legal estate in trust for him, he acquires thereby priority over any anterior incumbrancer of the mere equity, of whose incumbrance he had no notice when he advanced his money; and inasmuch as it cannot be necessary that the person who has the legal estate in himself should go through the form of declaring that he will hold it first for the party who has the first charge, and next for himself, the person who has the legal estate in himself is just in the same position as if he had got a declaration from a third person holding the legal estate, that he will hold it in trust for him.

I follow *Wilmot v. Pike*, therefore, and assume, for the purpose of this discussion, that the Defendant *Harrison*, being trustee of this legal estate for General *Wallis's* personal representatives—that is to say for himself and *Saint*, to the extent of securing 24,500*l.*,—is subsequently to be treated as having a declaration of trust of that legal estate, to secure his own advance of the 6000*l.* I may observe, in passing, that the case does not come up to that. The second advance was by the Defendant *Harrison* and *Edward Harrison* together, and therefore the case in that respect is not quite so favourable to *Harrison* as the case of *Wilmot v. Pike*, where the trustee might be well supposed to hold it on an implied trust for himself. But, assuming that to have been the position of things before the sale, if the Plaintiffs had filed their bill before the sale to redeem General

Wallis's executors, and on payment of the 24,500*l.* to have a conveyance of the legal estate, then, according to *Wilmot v. Pike*, the Defendant *Harrison* might be in a position to say, 'You cannot get the legal estate from me on that payment. I am trustee for General *Wallis's* executors to the extent of 24,500*l.*; but when you have paid that sum, I shall not part with the legal estate, nor permit you to acquire it by way of foreclosure, because I am armed with the legal estate for my own protection: it protects me from any dealing with it until my debt has been first satisfied.'

1855.
ROOPER
v
HARRISON.
Judgment.

But what takes place is this, and the more I have thought of it the more it has seemed impossible to apply the doctrine to the legal estate which I have assumed that the Defendant *Harrison* once possessed. In 1852, *Harrison*, in exercise of his duty as trustee for *Wallis's* executors, with the concurrence of *Saint*, the other executor, as is expressly stated in the deed, sells this property for 35,000*l.*, in order to pay off the mortgage due to General *Wallis's* estate. There were other ways of doing this. *Harrison* might have advanced the money out of his own pocket, and have held the whole legal estate for the two debts, saying, 'I stand on the legal estate, and shall hold it for the two debts. I advanced the money, and I rest on the legal estate.' Or he might have raised the money by transfer of the mortgage, and have procured the person who took the legal estate to execute a declaration, that he would hold it on trust to secure himself his mortgage debt, and secondly, to secure that of *Harrison*; and had he taken this course, *Harrison* would now be the person having the best right to call for it on any anterior redemption of the legal estate. But instead of taking any such course, he sells the estate; and as it is expressly stated in the deed, the money is received by him, to be held on the trusts declared by the indentures of 1840 and 1841, those trusts being for the persons interested in the equity of redemption. The moneys have got into his

1855.
 ROOPER
 v.
 HARRISON.
 Judgment.

hands in execution of his duty to General *Wallis's* estate, the legal estate has been parted with, and parted with in the execution of that duty.

The whole doctrine of this Court about the protection afforded by means of the legal estate is simply this: A party getting the legal estate acquires no new right in equity in any way. But, equity, regarding all the persons who have incumbrances according to their priorities, considering that the equitable interests pass, just as the legal interest does, by the effect of the deeds, finds itself checked at times, and an obstacle thrown in its way by an incumbrancer's saying, "I have got the legal estate interposed; I insist it is mine at law, and there must be a superior equity shewn in order to deprive me of my legal estate." It is merely staying the hands of the Court, by resting on that legal estate which this Court will not deal with, unless a superior equity can be shewn; and although the Court holds that priority will give equity, yet it does not hold that it gives so superior an equity, as between several incumbrancers, as to enable a person who has an anterior charge to wrest the legal estate from the person who has obtained it without notice of the anterior charge, and who has not parted with it. That is the whole effect of the doctrine, and none other.

But here the rights of the parties having been fixed, as I hold they were, long anterior to the sale in point of date, the party who now claims the protection of the legal estate, instead of keeping it in his hands, has chosen, in execution of his duty to General *Wallis*, whom I assume to have had the first legal estate, and in discharge of a debt which must necessarily be paid to him in the execution of that duty, to exhaust the whole legal estate in securing the interest of his testator. That being so, the money comes back simply limited on the trusts of the equity of redemption. No es-

ate can be interposed in the distribution of this money. It seems to me upon that ground alone that the money is here affected by all the interests which existed in the equity of redemption; and I find nothing in the way to prevent the security being applied in the manner in which the Plaintiffs now claim to have it applied.

1855.
ROOPER
v.
HARRISON.
Judgment.

It is said that this would render it a mere matter of machinery; but that, in truth, is the result of the whole doctrine of this Court about the legal estate, and a very singular machinery it sometimes is. It is merely a question of how far a person, who has dexterously managed to lay hold of this tabula in naufragio, is allowed to seize it. Even after bill filed by the second incumbrancer he is allowed to seize it, but it is on that he rests. It would seem to militate very much against all the views which this Court entertains of not allowing rights to be disturbed by third persons, and there was some hesitation and doubt as to allowing a person holding the legal estate to hand it over to the one or the other as he thinks fit. All that is a very peculiar part of this doctrine; but the Court has never gone beyond this: and if it does not find the legal estate interposed, it deals with the money according to priorities.

This seems to me to dispose of the whole case, even assuming the Defendant *Harrison* to have once had the legal estate; but I have thought it necessary, as the point has been argued fully and with considerable ability, to investigate the actual position of the legal estate.

There is, first, the advowson, which, in the year 1790, became separated,—not, however, so as to sever the appendancy to the manor, by a sale to *Vaillant* for the residue of a term of 500 years, created in 1745. All the subsequent conveyances of the manor, containing general words,

1855.
 ROOPER
 v.
 HARRISON.
 —
Judgment.

passed the advowson an appendant to the manor, there not having been any freehold interest created in it as distinct from the manor. The advowson passed with the manor by the general words, subject only to the outstanding term in *Vaillant*.

Then, as to the terms created in this estate. The first was the term of 1712, the exact nature and purport of which do not appear. There is only a short recital, by which it appears, that the term was vested in two persons, named *Cranmer* and *Gaville*. The second term was created in 1741. That was a term of 500 years in *Willis* and *Bowling*, and was created for the purposes of younger children of *Francis Vincent* and *Elizabeth* his wife, and she died without issue. It does not appear whether there was any provision for cesser of that term, and, as regards the advowson, it appears afterwards to have been dealt with in the manner I will presently mention; but, as regards the body of the estate, one hears no further mention of that term, and that term unquestionably must be presumed to have been surrendered and to be now entirely out of the way, at least as regards the body of the estate. The third term was created in 1745, a term of 500 years in Lord *Effingham* and *Willis*, for the purpose of raising portions for younger children of *Francis Vincent* and *Mary* his second wife. There was a proviso for cesser of that term, and the portions were, in fact, raised by the sale of that term in the advowson to *Vaillant*; whether that raised the whole money does not appear, but the whole money was in fact raised; and there is no doubt of that term of 1745 having ceased, except as regards the advowson. As regards the manor, it ceased. Those two terms are, I think, out of the way. Then comes the term of 1768,—a term of 600 years,—vested in Sir *Thomas Champneys* and *John Willis*, for the purpose

of raising 12,000*l.* This term, in 1769, was assigned to *Neate*, for the purpose of securing 10,000*l.* Then, the subsequent dealings with the terms were these:—In 1791, *Neate* assigned his 600 years term to *Ramsay*, on a transfer of the mortgage, to secure the 10,000*l.* And, by a deed of the same date, after reciting a previous assignment of the term of 1712 to one *Bray*, upon trust for better securing 5000*l.*, provided for the portions of the younger children of *Francis* and *Mary Vincent* by the deed of 1745, and subject thereto upon trust for better securing the 10,000*l.* to *Neate*, and subject thereto upon trust to attend the inheritance, and reciting also the payment of the portions secured by the term of 1745, *Bray* assigns the 1712 term to *Seton*, to secure the 10,000*l.* assigned to *Ramsay*, and to wait on the 600 years term vested in *Ramsay*. The deed then purports to contain an assignment of the term of 1745, but it was not executed by the party purporting to assign it. It seems to me, however, that the term of 1745 clearly ceased.

1855.
 ROOPER
 v.
 HARRISON.
 Judgment.

In 1791, therefore, we find the 600 years term in *Ramsay*, and the term of 1712 in *Seton* as a trustee for *Ramsay*. Then, in January, 1801, an indenture is indorsed, not on the deed which assigned the term of 1712, but on the deed which assigned the 600 years term to *Ramsay*. It is made between *Coutts*, *Watherstone*, and *Seton* (the same *Seton* who had the term of 1712), described as executors of *Ramsay*, of the one part, and *William Rowe* of the other part; and thereby, in consideration of the payment to them by *Rowe* of the 10,000*l.*, the parties of the first part assign to *Rowe* the property, with the usual clause beginning "and all the estate &c.," of the parties, for the residue of the term of 600 years, as a security for the 10,000*l.*; and then the question arises, whether the 1712 term, vested in *Seton* as trustee for *Ramsay*, merged by the effect of that assignment.

1855.
 ROOPER
 v.
 HARRISON.
 —
Judgment.

It is singular that there should be a dearth of authority on this subject. Several cases were cited to shew, what it hardly needed authority to shew, that where a person assigns and conveys "all his estate, right, title, and interest," and all his estate, right, title, and interest are not recited in the deed, still, if he has other beneficial interests in the property, they pass. It is suggested, that *Seton* might well assign the term of 1712 so as to let it merge in the 600 years term. But it is well-known law, that estates vested in a person in autre droit are so different from estates vested in him in his own right, which is the position *Seton* must be looked upon as occupying in reference to the term of 1712, that an assignment by a person of all his goods and chattels will not pass those he holds as executor, unless he have none of his own; in which case, from the necessity of the thing, they are held to pass;—the ground of that doctrine being, that the two things are so clearly distinct in the party, that the intention, when he speaks of his own simpliciter, is not to pass anything which he holds in autre droit. Possibly, in this case, the inference is not quite so strong. But here all the conveying parties are described as executors, and are all, as such, made parties of the one part, and, as a body, convey the whole estate vested in them in the capacity in which they are so made parties. It is needless to repeat the reasons I have already given for considering that this point can never, in my view of the case, become anything more than a speculative point; but if I had to determine it, I should not think myself justified in holding, that a conveyance by persons described as executors, and assigning the estate they held quâ executors for the 600 years term, would pass by force of the words "and all the estate, right, title, and interest" that which one of them held for his own purposes and in his own right. And such was the position of Mr. *Seton*. It is true he was a trustee for *Ramsay*, but in the eye of the law he must be viewed as

holding the 1712 term for his own purposes and in his own right. The conclusion I come to is, that the 1712 term was not merged.

1855.
ROOPER
v.
HARRISON.
Judgment.

I do not say that it ought to influence my judgment on the present occasion; but I may mention the circumstance that this was evidently the view taken by the conveyancers when these large securities were being prepared; for we find, at a subsequent period, this term of 1712 expressly assigned by a deed dated in 1820, to which the same *Seton* is made a party, and by which he assigns the term to *John Smith* as a trustee. So that the conveyancers did not treat the term as merged. I apprehend that is a sound construction. It is contrary to the intent of law when three persons, described as executors, assign over an estate for an actual term vested in them as executors, followed by the words, "and all the estate &c.," to hold, that the assignment passes also the rights which those executors held individually for their own benefit in the same estate.

I should, therefore, consider the term of 1712 as an outstanding term in 1820. If outstanding in 1820, and then assigned in trust for the inheritance, I cannot now deal with it as a surrendered term, or as any thing else than an outstanding legal interest. If so, it takes priority of the legal interest in the 1768 term, and the Defendant *Harrison* did not take the legal estate.

The advowson stands in a different position, I am inclined to think; and perhaps it may be necessary to hold, that, as regards the advowson, the terms must be presumed to have been surrendered.

I should mention, first, that there is an intermediate term which I have not noticed, a fifth term created in 1802. It is only necessary to be noticed, because it prevents all the other terms from merging in the fee. As re-

1855.
 ROOPER
 v.
 HARRISON.
 Judgment.

gards the advowson, in 1803 the 1745 term, which had been sold to *Vaillant*, was vested in the Defendant *Hugh Smith*, in trust for *Hugh Smith*, the father. The assignment is somewhat unusually worded. It is not an assignment "upon trust to attend the inheritance," but "upon trust for *Hugh Smith*, the father, his executors, administrators, and assigns." In the same year the terms of 1712 and 1741 were assigned, as to the advowson, to *Raymond Rowe*. The consequence would seem to be, that, so far as regards the advowson, the 1741 term being the next term expectant on the 1712 term, the term of 1712 merged in the term of 1741, and in 1803, the term of 1741 became, in effect, the only term vested in *Raymond Rowe*. This assignment also was expressed to be upon trust for *Hugh Smith*, the father, "his executors, administrators, and assigns." In 1803, therefore, as regards the advowson, the term of 1741 was in *Raymond Rowe*, and the term of 1745 was in the Defendant *Hugh Smith*, and both in trust for *Hugh Smith*, the father, his executors, administrators, and assigns.

Then, in 1831, by the operation of the will of *Hugh Smith*, the father, the legal estate in the reversion becomes vested in the present *Hugh Smith*; and upon this a question arises of some nicety—whether there is any intermediate estate or not. The 1768 term did not affect the advowson, and the term of 1802 was created just before the deed of 1803. The term of 1802 conveyed the manor, I suppose, with general words; but that does not distinctly appear. If it conveyed the manor with general words, then the advowson passed as appendant to the manor, and would be comprised in the term of 1802; and in that case the term of 1802 would be the term expectant on the termination of the term of 1745, which in 1802 was outstanding in *Vaillant* or those who claimed through him, and which in 1803 came to the Defendant *Hugh Smith* in

trust for his father, his executors, administrators, and assigns; and that would prevent any merger resulting in consequence of the life interest acquired by the Defendant *Hugh Smith*, and the term of 1745 would remain outstanding in him. And it seems to me, as the terms of 1741 and 1745 in the advowson do not appear to have been dealt with from the remote date of 1803, that one of two things must be supposed: either the term of 1802 did not comprise the advowson, and the terms, or at least that of 1745, have merged in the inheritance, or they must be presumed to have been surrendered. The case does not seem to me to be clear, and I have not considered it necessary to pursue it with the same minuteness as regards the advowson.

1855.
ROOPER
v.
HARRISON.
Judgment.

As regards the manor, I do not think the term of 1712 was either merged or surrendered, and that prevents the legal estate being in *Harrison*. As regards the advowson, the case is involved in more difficulty. Something seems to have been done about this in the order obtained in 1851, for Mr. *Harrison* to convey the advowson in lieu of *Hugh Smith*. There is this peculiarity, that it was held in trust for *Hugh Smith*, his executors, administrators, and assigns, and was not a trust to attend the inheritance. Whether it was by way of precaution that it was done, I know not, but on obtaining that order the advowson was dealt with differently from the rest; and as to that I have not come to so clear a conclusion as to the precise rights of the parties as if I had thought it necessary to decide the case on that point.

The result is, that the decree must be simply as prayed.

Mr. *Archibald Smith* recalled to the recollection of the Court the argument, that, before the Defendant *Harrison* had notice of the Plaintiffs' security of 1843, he had appropriated the surplus of the purchase money in satisfac-

1855.
ROOPER
v.
HARRISON.
Judgment.

tion of his own mortgage; and inasmuch as a payment by him to any other incumbrancer would have been good before notice, this appropriation or payment to himself was good also, and should not be disturbed.

The VICE-CHANCELLOR:—

I considered that point. It crossed my mind when going through the papers, that the money had not got out of your hands. As the *Vice-Chancellor* puts it in *Wilmot v. Pike* (a), you could, without any breach of trust, have paid the surplus to persons who had got subsequent incumbrances; but if I find it in your hands, I cannot permit you to say you have appropriated it to yourself.

I must declare that the several incumbrances created by *Hugh Smith* and *Hugh Wallis Smith*, or either of them, had priority according to the dates of the several instruments by which they were created, as to the estates included therein; and that in the Plaintiffs' securities the advowson passed, as appendant to the manor, by the effect of the general words.

(a) 5 Hare, 21.

1855.

CHAPPELL v. SHEARD (a).

Aug. 2nd &
3rd.

THE Plaintiffs, who carried on business under the style or firm of "*Jullien & Co.*," claimed to be the publishers and sole proprietors of a song called "*Minnie*," consisting of words set to music, with a symphony and accompaniments, which was first published by the Plaintiffs on the 6th of November, 1854, and on the title page of which was printed "*'Minnie,' sung by Madame Anna Thillon and Miss Dolby at Monsieur Jullien's Concerts; written by George Linley. London: Jullien & Co., 214, Regent-street, and 45, King-street.*" The title page also contained a portrait of Madame Anna Thillon, taken from a lithographed drawing made for the Plaintiffs, and at their expense, by an artist, to whom Madame Anna Thillon sat for the purpose.

Popular Song
—Name and
Description—
Property—In-
junction.

Certain music publishers having adapted original words to an old American air, which was re-arranged for them, gave to the song so composed the name of "*Minnie*," and procured it to be sung by Madame Anna Thillon—a popular singer—at M. Jullien's concerts in London; and when it had by that means become a favourite song, they published it with a title page, contain-

The words of the song were written and composed by one *George Linley*, and by him set to an old *American* melody known as "*Lillie Dale*," in which there was no copyright; and he arranged the symphony and accompaniments for the song, adding a cadence at the close, and assigned the copyright therein to the Plaintiffs.

ing a picture of the singer who had brought the song into notice, and the words "*Minnie*, sung by Madame Anna Thillon and Miss Dolby at Jullien's Concerts, written by George Linley," &c.:—Held, that the publishers had by these means obtained a right of property in that name and description of their song which a Court of equity would restrain any person from infringing.

Another music publisher subsequently published the same melody, with different words, and upon the title page they placed a similar portrait of Madame Anna Thillon, with the words "*Minnie Dale*, sung at Jullien's Concerts (and always encoored) by Madame Anna Thillon; the Music composed by H. S. Thompson," &c., this song having never, in truth, been sung by Madame Anna Thillon at Jullien's concerts.

Held, that this was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers, and at their suit an injunction was granted on interlocutory application to restrain this or any other similar infringement of their right to the name and description of their song.

Scable, that such a suit should be instituted without delay after discovering the infringement.

(a) See the next case.

1855.
 CHAPPELL
 v.
 SHEARD.
 Statement.

The proprietorship of the copyright and the assignment had been entered at *Stationers' Hall*.

"Minnie" was sung by Madame *Anna Thillon* at certain public concerts at *Drury Lane* and *Covent Garden* theatres in the months of November and December, 1854, and January and February, 1855, and was very successful, and became popular.

The Defendant *Sheard* was a music publisher carrying on business at the Musical Bouquet Office, No. 192, *High Holborn*, and the Defendant *Allen* was a music publisher carrying on business at No. 20, *Warwick-lane, Paternoster-row*. In the month of June, 1855, the Defendants published a song to the same air, which they called "Minnie Dale," on the title page of which were printed the words, "Musical Bouquet. Minnie Dale, sung at *Jullien's* Concerts (and always encored) by Madame *Anna Thillon*. The music composed by *H. S. Thompson, London*, Musical Bouquet Office, No. 192, *High Holborn*; and *J. Allen, 20, Warwick-lane, Paternoster-row*." On this title page was also a portrait of Madame *Anna Thillon*, which was a copy, with some slight alterations, but reduced in size, of the portrait on the title page of the Plaintiffs' song "Minnie;" but the words of Minnie Dale were different from the words of the Plaintiffs' song "Minnie;" and the statement, contained on the title page of "Minnie Dale," that that song was sung at *Jullien's* concerts by Madame *Anna Thillon*, was untrue.

The Plaintiffs first became acquainted with the fact of the publication by the Defendants on the 20th of June, 1855, and they immediately issued and sent round to the music-sellers and publishers in *London* and elsewhere a circular in the following terms: "To music-sellers and publishers—'Minnie' Caution! Two spurious editions of this popular

song having been issued, we hereby caution you not to sell the same, as we intend taking proceedings against any one who offers copies for sale. On the other side is an exact copy of the title of each for your guidance. We are, yours obediently, *Jullien & Co.*, 214, *Regent-street*, June, 1855." On the other side of the circular was a copy of the title page of "*Minnie Dale*." On the 10th of July, 1855, the Plaintiffs caused a copy of this circular to be left for the Defendants at the Musical Bouquet Office, the place of business of the Defendant *Sheard*; and the publication of "*Minnie Dale*" not having been discontinued, on the 28th of the same month the Plaintiffs caused a copy of the same notice to be left at No. 20, *Warwick-lane*, the place of business of the Defendant *Allen*.

1855.
CHAPPELL
v.
SHEARD.
Statement.

The Plaintiffs now filed their bill against *Sheard* and *Allen*, praying for an account and payment of all the profits made by the Defendants upon the sale of the said song "*Minnie Dale*," and for an injunction to restrain the Defendants from printing, publishing, selling, exposing for sale, or otherwise disposing of the said song "*Minnie Dale*," or any copy or copies thereof, or any other publication consisting of or containing a colourable imitation or adaptation of the said song "*Minnie*," or the name, title, or title page thereof, or the portrait lithographed on the title page thereof, and from otherwise pirating the said song "*Minnie*" or infringing the copyright of the Plaintiffs therein.

Mr. *Rolt*, Q. C., and Mr. *Chapman Barber* for the Plaintiffs.

Argument.

Mr. *Daniel*, Q. C., and Mr. *W. D. Lewis* for the Defendants.

1855.
 CHAPPELL
 v
 SHEARD.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

There are four things which are the main characteristics of the Plaintiffs' song with reference to the purchasing public—the name of the song—the person by whom it was sung—the name of the composer, and possibly, I may add, the name of the publisher. Those are the characteristics by which any one wishing to buy the song would describe it. The name of this song, which has acquired such popularity, is "Minnie;" it was sung by a popular singer *Madame Anna Thillon*; and therefore the name of "Minnie," and the fact of its being sung by this lady, are very important ingredients in the description of the thing to be sold. The two other points, the composer's name and the publisher's name, are not in question. The Defendants do not profess that their song is by the same composer or the same publisher. But the first thing anybody proposing to purchase the song would say would probably be "I want Minnie, sung by *Madame Thillon*;" that name and description, it seems to me, the Defendants have no right to whatever. The Plaintiffs' publication is the identical song which that lady did sing; it was composed for the Plaintiffs; it is called by the name of "Minnie;" and they had a perfect right to intitle it "Minnie," as a song sung by this lady; and then, the name having acquired a celebrity as the name of a song sung by her, the Defendants advertise another song by the same name as sung by this lady, which cannot be meant merely to refer to the melody as sung by her. No person who heard "Scots wha hae" sung by *Braham*, would ask for "Hey Tuitte Taitte," the name of the old melody. Therefore it seems to me that there was a plain and palpable purpose in the assumption of the name. The original song as sung in America was "Lillie Dale," and the Defendants have changed it into "Minnie Dale sung by *Madame Thillon*," and such a description can be for no other purpose than to appropriate the property of the Plaintiffs.

I think the portrait is a minor incident. It is so common to put those extraordinary looking objects called "Portraits" on such songs, that I do not think much of that. If the notion of the purchasers concerning the song was formed from the portrait, they would certainly never mistake one for the other ; but the principal thing is the name of the song and the person by whom it is sung.

1855.
CHAPPELL
v.
SHEARD.
Judgment.

Some observations were made as to the unfairness of the Plaintiffs in printing on the title page of their song, "written by *George Linley*;" they may have no objection to the public believing that *Linley* did compose the music as well as write the words, still the representation is "written by." The Defendants' witness says, however, that the words "written by" are so small that the public would not see them. I cannot say that. They are printed in a fainter character unquestionably. But if the words "written by" are seen, nobody seeing "written by" *Linley* would necessarily suppose it was composed by him. The words "written by" are so constantly used in a different sense, that nobody would conclude it was *composed* by him. Then, on the inside, the name is put where the composer's name generally is, but I cannot lay great stress on that. There is nothing stated on the outside about composed—it is "written by" *George Linley*; if they had put the words "arranged" by him, it could not be otherwise than a truthful representation of what was actually done.

There remains one other point. One of the Plaintiffs alone has sworn that he did not know of this publication until a recent period; which would be a most unfair representation if it did not mean that neither he nor any of his partners knew of it. But looking at the circumstances of this publication and the Plaintiffs being musical publishers, and the Defendants' publication having been made some

1855.
CHAPPELL
v.
SHEARD.
—
Judgment.

time, I think it is right that the want of knowledge should be more definitely stated in the Plaintiffs' evidence ; as no knowledge is actually brought home to them, I think it is not wrong to allow further evidence to be given by affidavit to prove that neither of the Plaintiffs knew of the infringement by the Defendants until a recent period.

Aug. 3.

On this day the required evidence was read to the Court, and the Vice-Chancellor thereupon made an order for an injunction to restrain the Defendants from printing, publishing, selling, exposing for sale, or otherwise disposing of the said song "Minnie Dale," or any copy or copies thereof, or any other publication containing a colourable imitation of the name, title, or title page of the Plaintiffs' said song.

1855.

CHAPPELL v. DAVIDSON.

Nov. 28th.

THIS was another suit for an injunction to restrain the publication and sale of another imitation of the same song as was the subject of the suit in the last preceding case.

*Injunction—
Good Faith of
the Plaintiffs
—Costs.*

The Plaintiffs having published a song, on the title page of which was a portrait of Madame Anna Thillon, and the words "Minnie, dear Minnie, sung by Madame Anna Thillon and Miss Dolby at Julien's Concerts, written by George Linley," &c., and

The Defendant was a music publisher in London, who, without the permission of the Plaintiffs, in May or June, 1855, published a song intitled "Minnie, dear Minnie," on the title page of which were the words "Minnie, dear Minnie. Madame Anna Thillon. London: Davidson's Musical Treasury, Peter's Hill, Doctors' Commons." There was also upon the same title page, above the words "Madame Anna Thillon," a lithographed portrait of Madame Anna Thillon, which song having become very popular, the Defendant subsequently published another song, consisting of different words to the same air (in which there was no copyright), with a title page on which was a different portrait of Madame Anna Thillon, copied from an American publication, and the words, "Minnie, dear Minnie. Madame Anna Thillon."—Held, that this was an obvious attempt to pass off the Defendant's publication for that of the Plaintiffs, which had obtained the public favour, and this attempt was restrained by an interlocutory injunction without imposing upon the parties the necessity of trying the right at law.

Held also, that the words "Written by George Linley," who was chiefly known as a musical composer, on the title page of the Plaintiffs' song, did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him, as to deprive the Plaintiffs of their right to the injunction.

Nor did the entry at Stationers' Hall of the music as well as the words of the song, although the Plaintiffs might have entered only those parts of the publication to which they had an exclusive right.

The Defendant could not escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the Plaintiffs', because he could not secure that retail dealers purchasing from him would give the same information to their customers.

An interim injunction having been granted, the Defendant, instead of submitting, insisted on his right to continue the publication of his song:—Held, that he must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the Plaintiffs previously to the filing of the bill.

Another part of the Plaintiffs' case being, that the Defendant had pirated two bars of music which had been added by the Plaintiffs to the original air, the Court refused to extend the injunction to restrain such piracy until the fact had been established by a trial at law.

1855.
 CHAPPELL
 v.
 DAVIDSON.
 Statement.

dame *Anna Thillon*, but dissimilar from the portrait on the title page of the Plaintiffs' song "*Minnie*."

In "*Minnie, dear Minnie*," words were set to the air "*Lillie Dale*," with a symphony and accompaniments resembling those of the Plaintiffs' song "*Minnie*;" but the words of the Defendant's song were not the same as those of "*Minnie*," though they contained passages which the Plaintiffs alleged resembled, and were colourably imitated from, passages in the words of "*Minnie*."

The Plaintiffs filed the bill in this suit, alleging that the publication of the Defendant was published by him with a view of inducing the public to believe that it was the same song as that sung by Madame *Anna Thillon*, and published by the Plaintiffs under the title of "*Minnie*," and to purchase the same accordingly to the injury of the Plaintiffs. That the Defendant's song, "*Minnie, dear Minnie*," had never been sung by Madame *Anna Thillon*, and that song and the name and title thereof, and the portrait lithographed thereon, were a piratical imitation of the publication of the Plaintiffs, as would appear by inspection and comparison of the two publications respectively, and were an infringement of the aforesaid copyright of the Plaintiffs.

The bill prayed an account and payment of the profits made by the Defendant upon the sale of the song "*Minnie, dear Minnie*," and an injunction to restrain the Defendant from printing, publishing, selling, or exposing for sale, or otherwise disposing of the said song "*Minnie, dear Minnie*," or any copies or copy thereof, or any other publication consisting of or containing a colourable imitation or adaptation of the said song "*Minnie*," or the words, name, title, or title page thereof, and from otherwise pirating the said song or infringing the copyright of the Plaintiffs therein.

The Defendant's case was, that, having previously published the *American* song "Lillie Dale," in April, 1855, he purchased from a lady some verses written by her to the old air of "Lillie Dale," and gave them to a musical professor, together with a manuscript copy of the air, in order to enable him to compose suitable symphonies and accompaniments, being at the time totally ignorant of the symphonies and accompaniments composed by *Linley* for the same air; and that the professor employed by the Defendant composed symphonies and accompaniments accordingly, and added two bars as a refrain to the air, and without any knowledge of the Plaintiffs' song, and that he copied the entire design of the title page from an *American* publication, called "Dreams of Home." The Defendant further stated, that the words of his song differed entirely from the words of the Plaintiffs' song, and that the Plaintiffs' song was written as though by a woman, while Defendant's was supposed to be by a man.

1855.
 CHAPPELL
 v.
 DAVIDSON.
 —
Statement.

It appeared that no application had been made to the Defendant to discontinue publishing his song before the filing of the bill.

An interim injunction had been granted against the Defendant in the Long Vacation. This was a motion to continue it.

Mr. *Rolt*, Q. C., and Mr. *Chapman Barber* for the Plaintiffs.

Argument.

Mr. *Daniel*, Q. C., and Mr. *Selwyn* for the Defendant.

The arguments are fully noticed in the judgment. The cases referred to were *Flavel v. Harrison* (a) and *Perry v. Truefitt* (b).

(a) 10 Hare, 467.

(b) 6 Beav. 66.

1855.
 CHAPPELL
 v.
 DAVIDSON.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case depends rather upon the question, whether the Defendant has a right to sell, as his own, that in which another has acquired a description of property, than on the question of copyright. In truth, there is no infringement at all of what is strictly called copyright; there is no piracy of words, and the only thing which resembles an infringement of copyright is the alleged piracy of two bars of music. The question here is identical with that which arose in *Chappell v. Sheard* (a).

There was a certain song, called "Lillie Dale," the air of which was invented in *America*, and it was a song well known apparently there,—not so well known, it is said, in *England*, but which had been published by the Defendant himself in *England*. I gather that it does not appear to have become popular or available as property under the name of "Lillie Dale."

The Plaintiffs, however, thinking that the air had merit in it, obtained words, composed by Mr. *Linley*, to suit the air, and they gave to this new song the name of "Minnie." That was not the first word of the song, which begins, "When the sun is high in the bright blue sky;" but the Plaintiffs chose to give to this song the name of "Minnie." Of course, they had a right to compose such a song; they adapted the air with a certain change of arrangements, and the introduction of certain bars, giving a cadence at the close on which the musical professors set some value; and then the Plaintiffs procured, under an arrangement which they had made with M. *Jullien*, the advantage of Madame *Anna Thillon's* popularity, and she gave general notoriety to the song by singing it at M. *Jullien's* concerts. That circumstance seems to have caused the song to acquire considerable popularity. In consequence of this, it appears that, both in *Sheard's case* and in this, there

(a) Sup. p. 117.

was a manifest anxiety on the part of the Defendant to intimate to the public, that the song which the Defendant published was the song sung by *Madame Anna Thillon*.

1855.
CHAPPELL
v.
DAVIDSON.
Judgment.

The proceedings of the Defendant in this case have been such as to make it impossible to believe that he did not intend the public to suppose that his publication was the identical song which *Madame Anna Thillon* had sung, and which had become so popular through her singing it. It is said, that he calls it "Minnie, dear Minnie," and not "Minnie" alone, and that he has simply placed a portrait of *Madame Anna Thillon* on the title page, and put her name below. I adhere to my original view, that the portrait is of very small consequence; but placing the name *Madame Anna Thillon* on the title page of the song is of considerable importance. Nobody would know, I should suppose, that the portrait was intended for that lady if her name had not been written underneath it. Now, what honest motive could the Defendant possibly have in using the names of "Minnie," and "*Madame Anna Thillon*?" He says, that, after the singing of this song by *Madame Anna Thillon*, he having published the *American* song "*Lillie Dale*," a lady, *Mrs. Brown*, brought to him words which he thought would go very well to the air. Those words began, "Minnie, dear Minnie." It is said, that this lady is not to be found now. He does not tell us what put it into his head to use these words "Minnie, dear Minnie" as the heading of this song, which was before known by the name of "*Lillie Dale*;" but I think the meaning and purpose of the Defendant's acts are very manifest,—the same air having been already adapted to a song with the name of "Minnie." The Defendant avers that he took a portrait of *Madame Anna Thillon* from an *American* work, called "*Dreams of Home*," and placed it on his title page. But, then, why did he think of applying the portrait of *Madame Anna Thillon* and her name to this song? He might as well have taken *Madame Grisi* or any other person. Of course,

1855.
 CHAPPELL
 v.
 DAVIDSON.
 Judgment.

it is palpable that he meant the public to understand that this thing which he was about to sell was the identical song which was sung by Madame *Anna Thillon*, under the name of "Minnie." Of that I cannot have the least possible doubt. That is similar to what occurred in *Sheard's case*; and it seems to me that it is impossible for any other person to claim the right of doing such an act after the Plaintiffs had acquired a popularity for their song by the name of "Minnie," and had procured it to be sung by Madame *Anna Thillon*, and the song had become known to all vendors of music by that name and description. A person wanting to purchase it would say,—Give me such and such a song, sung by such and such a person,—give me "Minnie," sung by Madame *Anna Thillon*. That would be the common name by which the song would be inquired for; and then a purchaser asking for the Plaintiffs' song in that way might have this song which was published by the Defendant given to him. It is useless for the Defendant to allege as a defence, after he has done his best to lead the public to suppose that this is the song sung by Madame *Thillon*, that he cautioned his shop-boys and others to say that it was not the song of the Plaintiffs, and that the picture outside his song was merely a fancy portrait which he had put there, and the song was entirely a different composition from that of the Plaintiffs. An observation was made upon that in argument which was sufficiently obvious, and on which I acted in the former case, and which was also acted upon in *Sykes v. Sykes* (a), at common law. There it was proved, that the wholesale imitator of the Plaintiffs' trade-mark sold the goods so marked, distinctly representing that they were manufactured by himself and not by the Plaintiffs; but then it was answered, he sold them to retail dealers, that those retail dealers might sell them to the public, who would buy them as the goods of the Plaintiffs. So, here, Mr. David-

(a) 3 B. & C. 441.

son might sell copies of his song with the same intimation to retail dealers, but there is no security that those retail dealers would sell them with the same caution to the public.

1855.
 CHAPPEL
 v.
 DAVIDSON.
 Judgment.

What I proceeded upon in *Sheard's case* is what equally appears in this case—namely, the appearance of the title page, and the use of the name of Madame *Anna Thillon*. I do not think that the omission of the words “sung by” can make the Defendant's case better. That seems to me only to indicate a consciousness on his part, that he was doing what was wrong. I do not think it is necessary to lay stress on the imitation of two bars of the music. That is only a question of copyright; and certainly if the Plaintiffs intend to insist upon it as copyright, I should have to hear them in reply upon that, and to put them to an action on terms before I could continue the injunction. I propose to confine the injunction to the title page, omitting the words “pirating the said song, or infringing the copyright of the Plaintiffs therein,”

With regard to costs, there would have been a great difference if the Defendant had done what it was competent for him to do. If, when served with the interim injunction, he had said, “If you had applied to me not to do what you now seek to restrain me from doing, I should have been perfectly ready to have acceded to your request; and as you did not do so, if the interim injunction is continued, I shall ask for my costs;” there would have been a good deal to have been urged on the part of the Defendant, there having been no application previously made to him. But now that he comes forward and insists upon his right of publication, such an argument is at an end, and the case must be tried upon his right. He has never made an offer to desist from publishing, and I am obliged to try it as I should try any other case in which no previous application has been made. If the party brings the matter to a hearing and insists upon

1855.
 CHAPPELL
 v.
 DAVIDSON.
 ———
Judgment.

his rights, there is an end of any question as to the propriety of the preceding application.

When I investigate those rights, the only circumstance in this case at all distinguishing it from *Sheard's*, is the alleged misrepresentation to the public on the part of the Plaintiffs in holding themselves out as entitled to the copyright of the whole of this publication. In *Sheard's case*, the objection was made that there was an attempt to mislead the public, by putting Mr. *Linley's* name on the title page, he being a well-known musical composer, and quite as well known in that capacity as a poet, if not more so. There were on the title page in small print the words, "written by *George Linley*;" and in the work itself his name was printed in the corner, without anything more, and in a place where it might lead to the inference that he was the author of the music. I then intimated that I might have some misgiving as to whether there was or not a wish on the part of the Plaintiffs to mislead the public in that respect. At the same time I said then, and I think so now, that it would be a great deal too much to infer from that, unless something else untrue had been stated or done, that the public would conclude that *George Linley* was the composer of the music. Every word used is true. It is stated that the song was "written by Mr. *George Linley*;" and although in small print, it is in very distinct and visible print, and there is a separate line for it, and no person seeing the word "written," would think that meant *composed*. On the Defendant's song, it is stated to be arranged by *G. Halliday*, the poetry by Mrs. *Louisa Brown*, and the fact that those indications are given in other works and not given on the Plaintiffs' song, would lead to the inference, that as the Plaintiffs' song is not stated to have been "composed by *G. Linley*," no part of the music had been composed by him. I think that the inference from this circumstance of an intention to mislead is too faint, whatever degree of suspicion I may have on the subject,

hold that there was a direct misrepresentation to the public when every word stated is perfectly true, and all that I can found my suspicions upon is merely something inferentially suggested to the mind.

1855.
CHAPPELL
v.
DAVIDSON.
Judgment.

Then the entry at *Stationers' Hall* is relied upon. Assuming that the entry might have been made as to part of the publication only, when Mr. *Linley* had this entry made, the actual facts were, that he was the proprietor of the whole of that portion of the book which consists of the words of the song; he was the proprietor of the arrangement he had made of the music, including the two new bars; but the song itself was not an original song—that is to say, the world at large would have a right to print the original music separately, and detached from the words of Mr. *Linley*, and from this representation as to the name of “Minnie,” and its being sung by Madame *Anna Thillon*. However much it may go to the question of copyright, the entry at *Stationers' Hall* does not appear to me to amount to a wilful or fraudulent misrepresentation to the public of the rights of Mr. *Linley*.

If it is sought to obtain an injunction to restrain the piracy of the two bars, I must let that go to law, and leave the Plaintiffs to make such case as they can upon it; but if the injunction is to be confined to preventing this Defendant from holding out his goods to the public as being the goods of the Plaintiffs, I think then, as in *Sheard's case*, the full right is made out; and there is no such default on the part of the Plaintiffs in regard to deception, as entitles me to say they may not hold the injunction on the same grounds as they did in *Sheard's case*. As I have granted the injunction, I do not impose upon the Plaintiffs the necessity of bringing an action.

The Lords Justices, on appeal, brought, and reserved the costs continued the injunction, but on till after trial of the action. the terms of an action being

Dec. 11th &
12th.

SNOW v. BOOTH.

Stat. of Limitations—3 & 4 Will. 4, c. 27, ss. 25, 42—*Express Trust*—*Term—Annuity—Arrears*.

In 1824, A., and B. as his surety, covenanted to pay an annuity for ninety-nine years; and A. granted lands, to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life, to a trustee for 500 years, upon trust, in case the annuity should be in arrear for a month, and either before or after the decease of the surviving tenant for life, to sell for the purpose of raising the arrears of the annuity, and securing future payments. B. became bank-

rupt in 1827, A. in 1829. The last payment in respect of the annuity was made in 1831. Upon bill filed by the annuitant in 1854, one of the life estates still subsisting:—*Held*, that the Plaintiff was entitled to have the lands sold for the residue of the term according to the trust, and to payment of all arrears.

All that *Hunter v. Nockolds* (1 MacN. & G. 640) determined was, that, in a suit for the administration of the assets of a grantor of an annuity, the annuitant cannot prove, as a personal debt, for more than six years arrears. If the decision went to a case like the present, it is overruled by *Cox v. Dolman* (2 De G., MacN. & G. 592).

BY an indenture dated in 1824, *Noy*, and *Sheppard* as his surety, covenanted with *Morris* to pay him an annuity of 36*l.* by quarterly payments for 99 years, to be computed from the date of the indenture, if four persons therein named should so long live; and by the same indenture *Noy* granted and demised to *Bridger* certain freeholds, (to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life, for a legal and equitable estate in fee simple), to hold to *Bridger*, his executors, administrators, and assigns, from the date of the indenture for a term of 500 years, subject to the life estates, upon trust to permit *Noy* and his heirs to hold the premises until the same should become liable to be sold under the trusts of the indenture; and upon further trust, in case the annuity or any part thereof should be in arrear by the space of one calender month next after any of the days or times whereon the same ought to be paid as aforesaid, then that *Bridger*, his executors, administrators, or assigns, should, without the necessity of any further consent or concurrence of *Noy*, his heirs or assigns, and either before or after the decease of the tenants for life or the survivor of them, make sale and absolutely dispose of the said premises, or such part or parts thereof as *Bridger* should think proper, for all the then residue of the term of 500 years as therein mentioned. The deed then contained a declaration that the moneys to arise by the sale

should be held in trust to pay to *Morris*, his executors, &c., so much of the annuity thereby granted as at the time of the sale should be in arrear and unpaid, with costs occasioned by default in payment of the annuity; and upon trust to invest the residue for the purpose of forming a fund for payment of the annuity and costs, and subject thereto for *Noy*, his heirs, executors, or administrators. After the determination of the annuity, the demised premises remaining unsold were to be in trust for *Noy* and his heirs.

1855.
 SNOW
 v.
 BOOTH.
 Statement.

Sheppard became bankrupt in 1827, *Noy* in 1829.

In 1831, the reversion in fee, expectant upon the decease of the surviving tenant for life, in the demised premises was sold and conveyed, subject to the annuity and any claim in respect thereof, to the purchaser. When the bill was filed, it was vested in the Defendant *Drysdale*.

The last payment in respect of the annuity was made in 1831.

In August, 1854, a bill was filed by the surviving executor of *Morris*, against the administrator de bonis non of *Bridger*, *Noy's* creditors' assignee, and *Drysdale*, for an account of what was due in respect of the annuity, to have the premises comprised in the term of 500 years sold, and the proceeds of the sale applied towards satisfying the arrears of the annuity, and to have the surplus (if any) secured and invested, and from time to time applied, with the income, in keeping down the annuity.

When the bill was filed two of the persons for whose lives the annuity was granted, and one of the tenants for life, were dead.

The Defendant relied upon the Statute of Limitations as a defence to the bill, or, at any rate, to so much of it as

1855.
 SNOW
 v.
 BOOTH.

Statement.

Argument.

sought an account of arrears payable more than six year before the filing of the bill.

Mr. Rolt, Q. C., and Mr. Boyle for the Plaintiff

The Statute of Limitations is no bar to any portion of the Plaintiff's claim. The term is a subsisting term, demised by the party having a legal remainder in fee to a trustee, in whose representative it is now vested, upon an express trust. The case, therefore, is precisely within the exception provided by the 25th section of the statute, and time has not yet begun to run against the Plaintiff.

The point was decided as long since as 1845 by Lord Lyndhurst, in *Young v. Lord Waterpark* (a); and if doubt has been since thrown on that decision by *Hunter v. Nockolds* (b), all doubt is now removed by *Cox v. Dolman* (c) in which Lord St. Leonard's and the Lords Justices determined, that, where there is a subsisting term, upon an express trust to secure an annuity, the annuitant is not barred by the 42nd section from recovering the entire arrears (d).

Mr. Daniel, Q. C., and Mr. T. Stevens for the Defendant Drysdale.

The statute is a bar to the entire claim. When both trustee and cestui que trust are out of possession, the party entitled subject to the term, whose title is adverse to the term, must have the benefit of the statute, if he can show laches; and here no payment has been made since 1831.

(a) 15 L. J. (N. S.), Chanc., 63;
 S. C. 10 Jur. 1.

(b) 1 MacN. & G. 640.

(c) 2 De G., MacN. & G. 592.

(d) See Lord St. Leonard's
 "Essay on the New Statutes
 p. 105.

All events, the statute is a bar to so much of the bill as an account of arrears payable more than six years bill filed. If the term can be rendered available by plaintiff at all, his rights to recover are limited to six by the 42nd section of the statute. The exception added by the 25th section is confined to suits "against trustee or any person claiming through him." Here defendant *Drysdale* does not claim through the trustee and this suit is not within this exception. [The VICE-CHANCELLOR—In *Cox v. Dolman* and *Young v. Lord Waterpark*, the trust was enforced against parties claiming to the term.] In those cases both estates were created by the same instrument. Here the Defendant *ale* claims paramount to the term*.

1855.
SNOW
v.
BOOTH.
—
Argument.

The question cannot be considered as concluded by *Cox v. Lord Waterpark*. The decision in that case does not profess to be that of Lord *Cottenham* in *Hunter v. Nockolds*, but rests on all fours with the present.

* *Sic.*

Reply was not heard.

CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

In reference to the Statute of Limitations, I think I am aided by the cases of *Cox v. Dolman* (a), and *Young v. Lord Waterpark* (b). The only difference here is, that the defendant is not in possession. That circumstance, in my opinion, is immaterial.

That Lord *Cottenham* decided in *Hunter v. Nockolds* that a claim to arrears of an annuity cannot be treated as a personal debt against the grantor before six years. There the petitioners went in to prove

De G., MacN. & G. 592. Appeal, 15 L. J. (N. S.), Chanc., 63; 1 Sim. 204; S. C. on appeal, S. C. 10 Jur. 1.

1855.
 SNOW
 v.
 BOOTH.
 —
Judgment.

their claim as a personal debt against the estate of the party who granted the annuity; and having chosen to take that form of proceeding, they were allowed to prove the debt for six years, and no more. That seems to have been the view taken by Lord *Cottenham*, as distinguishing *Hunter v. Nockolds* from a case such as *Cox v. Dolman*:—that suit was not one in which a party sought to enforce his remedy by applying to have a sale of the trust property vested in his trustee;—but it was a case in which, in a suit for the administration of assets, the petitioners came in to prove their claim as a personal debt; and, that being so, he held they could not prove it beyond six years. If that was not the case in *Hunter v. Nockolds*—if the decision went to a case like the present, it is overruled by *Cox v. Dolman*.

Mr. *Daniel*.—It was against other incumbrancers in *Hunter v. Nockolds*.

The VICE-CHANCELLOR.—The only distinction one can draw between the two cases is, that in *Cox v. Dolman* the annuitant came to enforce his security against his trustee, who held it in trust for him.

What is the case here? A man grants an annuity, and carves out of his reversion in fee, which he then held, subject to two lives, a term of 500 years. He vests that term in a trustee, in whose personal representative it is now vested, and one life is still subsisting. He then directs the trustee to sell one month after default shall have been made, and either during the life estates or after their expiration, for the purpose of raising the charge.

In this state of circumstances, I apprehend it is impossible for the party who is now entitled to the reversion subject to the term, to say, 'It is true the trustee has a

s trustee to execute the trust on which he held the
who are entitled to the reversion subject to this trust,
right to prevent his calling on the trustee now to ex-
on the ground that he ought to have done so more
many years ago.' It is not for a trustee to complain
demand not having been made upon him sooner,
can I see that a reversioner can complain that the
which his reversion is expressly subjected has not
executed at an earlier period.

term is a subsisting term—it is still in reversion—it
upon an express trust—a trust authorising the sale,
which is still a continuing trust, and the Plaintiff's
simply this:—He calls upon the trustee of this re-
ry term to execute his trust, to sell the term and
sums charged upon it:—He does not seek to touch
his reversion, and his only reason for bringing
before the Court is, that *Drysdale* is the party
in any surplus which may remain after the other
the term shall have been performed. In this state
of things, it seems to me perfectly clear that the Plaintiff's
claim is made out—that he is not barred by the statute,
has a right to have the lands sold for the residue of the
owing to the trust, and to be paid all arrears.

1855.

Dec. 11th &
14th.

*Settlement—
Tenant for
Life—Rail-
way Shares—
Allotment of
new Shares.*

Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—
Held, that stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts of the settlement as corpus, and that the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds.

ROWLEY v. UNWIN.

By the marriage settlement of the Plaintiff and her husband, forty-five railway shares, and 1000*l.* secured on mortgage,—both the property of the Plaintiff,—together with other property of the Plaintiff's, were settled upon trust to pay the income into the proper hands of the Plaintiff, to the intent that the same might be enjoyed by her during her life, for her sole and separate use, independently of her then intended or any future husband, and so that the same might not be liable to his debts, forfeiture, or engagements. And it was thereby declared, that the only receipts which should be a valid discharge for the said income should be those which should be given by the Plaintiff after the sums, in respect of which such receipts should be given, should actually have become due; and that the Plaintiff should have no power to anticipate, alien, or assign the income or any part thereof. And, after the decease of the Plaintiff, the property was settled upon trusts for the benefit of her husband and the children of the marriage, with remainders over.

After the marriage, the shares were transferred into the names of the trustees of the settlement.

Subsequently to the transfer, new shares, designated "quarter shares," were issued by the railway company, and

Husband and Wife—Separate Use—Restraint on Anticipation—Acquiescence.

Wife entitled for life to income of settled property for her separate use, without power of anticipation. The trustees allowed the husband to use 1000*l.*, part of the trust funds, for four years. Shortly after which period, the wife separated from her husband, and then for the first time claimed interest on the 1000*l.* for the four years. She admitted she had allowed her husband to receive her income, so long as he behaved to her as a husband ought to do:—*Held*, that the wife was not entitled to the interest claimed.

1855.
ROWLSY
v.
UNWIN.

Argument.

There was an admission by the Plaintiff, that she had allowed her husband to receive the income of her property so long as he behaved to her as a husband ought to do.

Mr. *James*, Q. C., and Mr. *Giffard* for the Plaintiff, insisted, that, inasmuch as the calls upon the eighteen quarter shares were paid out of the Plaintiff's separate income, she was entitled absolutely to the stock purchased with the proceeds of the sale of such shares.

With regard to the 1000*l.* for a period of four years previously to the 17th of February, 1849, the date of the mortgage, that sum had been constructively in the husband's hands. The Plaintiff, therefore, was entitled to interest for that period, and to a lien on the mortgaged property in respect of such interest; since the agreement was, that the mortgage should be executed immediately upon the husband receiving the money.

Mr. *Daniel*, Q. C., and Mr. *Chapman Barber*, for the husband.

Upon the second point, they cited *Beresford v. The Archbishop of Armagh* (a), contending, that, independently of the Plaintiff's express admission as to having assented to her husband's receiving her income, she would have been precluded from making her present claim to arrears of interest, accruing during cohabitation, upon the ground of a presumed assent.

Mr. *Rolt*, Q. C., and Mr. *H. Stevens*, appeared for the trustees.

Mr. *James*, Q. C., in reply.

(a) 13 Sim. 643.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

With regard to the eighteen quarter shares, there can be no doubt that such shares, notwithstanding the calls were paid out of the wife's separate income, followed the trust. They became subject to the trusts of the settlement as corpus. It is analogous to the case of a tenant for life renewing leasehold property, and advancing money for the fine due on the renewal. A tenant for life, under such circumstances, would only have a charge on the property for the amount so advanced. I must declare, that the stock purchased with the proceeds of the sale of the eighteen quarter shares is subject to the trusts of the settlement, the Plaintiff having a lien thereon for the amount of the calls paid out of her separate income.

1855.
ROWLEY
v.
UNWIN.
—
Judgment.

With regard to the interest on the 1000*l.*, if that point is to be pressed, I must look into the authorities.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The only point remaining to be considered in this case is, as to the sum claimed by the wife in respect of interest upon 1000*l.* originally secured by a mortgage, and which, upon the mortgage being paid off, was allowed to be received by the husband, and was paid by him into the bank, where she had a separate account, in liquidation of a debt of hers to the bankers, for which the husband was liable; so that the money, in effect, was used by the husband for a period of four years.

Dec. 14th.
—
Judgment.

Of course, the wife could not beforehand consent to his receiving the interest, for she had no power of anticipation; nevertheless, during the period in question, the fund was constructively in the husband's hands. He had the use of

1866.
 ROWLEY
 v.
 UNWIN.
 Judgment.

money for which he was bound to pay interest. Suppose he had given a mortgage for it,—a state of circumstances which, I think, would be exactly the same as this,—he would then have been indebted for interest to the wife *de anno in annum*. It is true there would have been no money in his hands; but if the wife's trustees had appointed a receiver, who had paid the rent of the mortgaged property to the husband, it would then fall within the ordinary rule, which precludes a wife from recovering the past income of her separate estate, upon the ground of a supposed gift by her of such income to her husband. In *Howard v. Lord Digby* (a), the *Duchess of Norfolk's case*, commented on by Lord *St. Leonard's* in his "Treatise of the Law of Property as administered by the House of Lords" (b), lunacy intervened. In that case, therefore, the presumption of a gift or agreement on the part of the wife was excluded. In this case, the parties separated within a few months after the time when the interest accrued due, and the wife made no demand for interest up to the time of the separation, although she did immediately afterwards. She admits that she allowed her husband to receive the income of her property generally.

I can draw no distinction between moneys in the hands of the husband, the interest of which the wife might have claimed, and moneys out on mortgage in the way I have supposed.

I must, therefore, declare, that the Plaintiff is not entitled to the interest claimed.

(a) 2 Cl. & F. 634; S. C. 8 Bli. N. S. 224.

(b) Pp. 162—170.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Statement.

same trustees should stand possessed of real estate in *Ireland* for a term of 500 years, to be computed from the death of the survivor of the Earl and *Catherine*, upon trust, in the like event, to raise 25,000*l.* for the additional portions of such two younger children, to be subject to a power of appointment in the Earl surviving, and to limitations over in default of appointment, similar in every respect to those to which the 40,000*l.* was subject.

Catherine, the wife of the Defendant the Earl, died in 1825.

There were three children of the marriage, viz. Viscount *Wellesley* (the eldest son), the Honourable *James Wellesley*, and the Plaintiff.

By deeds poll executed in 1838 and 1840, the Earl appointed to *James*, of the 40,000*l.*, sums amounting in the whole to 29,000*l.*, to be vested in and assignable by *James* immediately upon the execution of the deeds, and to be raised immediately after the Earl's decease (a).

The object of these deeds poll was to provide funds for payment of *James's* debts, and to secure an annuity for his maintenance.

These deeds were not impugned.

In November, 1850, 36,000*l.* still remaining unappointed, the Earl executed the two deeds, which it was the object of the present suit to set aside.

(a) The deeds of 1812 contained hotchpot clauses, upon which there arose a question of construction, turning upon the wording of a proviso specially and inartificially framed. The

Court held that the shares appointed to *James* in 1838 and 1840, were exempt from the obligation of being brought into hotchpot.

By these deeds, dated the 2nd of November, 1850, the Earl appointed the 36,000*l.*, residue of the 65,000*l.*, as follows: viz. sums amounting to 27,000*l.* to *James*, and sums amounting to 9000*l.* to the Plaintiff; and directed that such sums respectively should be interests vested in and assignable by them immediately upon the execution of the deeds, and should be raised immediately after the execution thereof, and be paid to them, their executors, administrators, or assigns.

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
—
Statement.

On the 23rd of October, 1851, *James* died intestate and unmarried. Letters of administration to his estate and effects were granted to the Earl.

In May 1854, the Plaintiff filed her bill against the Earl and assignees of his interest in the 27,000*l.*, charging that before the date and execution of the deeds of the 2nd of November, 1850, it was well known to the Earl, as the fact was, that *James's* life had been and was despaired of by his medical advisers and attendants, and that his recovery was hopeless; that the deeds were intended to be, as they were in fact, concealed until after the death, which was then shortly expected, of *James*; and that they were executed by the Earl for his own benefit and advantage, and in fraud of the powers, and not for the benefit or advantage, or with any regard to the interests of his younger children, or either of them; and praying that it might be declared that they were fraudulent and void, and to have them set aside, and delivered up to be cancelled.

The Earl by his answer put in issue all the matters charged in the bill, and stated as his motive for executing the deeds of November, 1850, that, having reason to fear that *James* might continue in an infirm state of mind and body, he was anxious that such a provision should be made for him as should enable him to live in comfort; and that

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Statement.

he had also the best reason to believe that the Plaintiff would be well provided for, independently of the portion moneys; and he submitted, that, in executing the deeds, he exercised a discretion which he was entitled to exercise under his marriage settlement.

The material evidence was as follows:—

In January, 1847, *James* was ill at *Nice*, and on the 29th of January, the Earl wrote to his nephew, Col. *Bagot*, then at *Nice*, to make inquiries of the physician attending *James* as to the state of his health. In reply, Col. *Bagot*, on the 5th of February, 1847, wrote to the Earl, that, immediately upon receiving his letter, he had put himself in communication with Dr. *Travis*, the physician attending *James*, and stated the results:—*James* was within the last few days better than when he first arrived, but a removal from *Nice* was indispensable to his recovery, owing to the imminent hazard of the climate acting in such a manner upon a mind and constitution previously weakened, as to bring on incapacity to look after himself—a calamity which might happen there at very short or no previous notice.

Shortly afterwards, *James* was removed to *Turin*, and from thence in July, 1847, on the recommendation of Dr. *Davison*, his then medical attendant, to *Geneva*, where he remained till his death.

On the 10th of May, 1847, the Earl wrote to the Plaintiff as follows:—"I have to communicate to you a sad matter—Your brother *James* is, I fear, a declared lunatic. He is under confinement at *Turin*, and from the last accounts I heard, he is not long for this world."

In July, 1848, the Earl, being in *Paris*, requested an interview with Dr. *Davison*. Dr. *Davison's* affidavit as to what passed at this interview was as follows:—"The Earl

said to me he believed that I had attended his son *James* in *Italy*, and he desired to know in what state I found him; in answer to which I fully described to the Earl the deplorable state of health of *James Wellesley*. The Earl then asked me to what I attributed such state of health. To which I replied, I believed it arose from his having led a life of intemperance, and to excesses of various kinds, and to other causes, which I described. The Earl asked me whether I considered *Italy* a good place for him. In answer to which I said, I did not consider it a good place, because the summer heat was unfavourable. The Earl then asked me whether *James Wellesley* was likely to recover. To which I answered, that it was difficult to say, but that the probability was against it, though such cases did sometimes recover."

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Statement.

It was deposed by the affidavit of a Captain *Westley*, that, in May, 1850, he, at the request of the Earl made to him through a friend, called upon Mr. *Coverdale*, the solicitor of Lord *Wellesley* and the Plaintiff, to ascertain the then state of health and condition of *James Wellesley*; and that, upon his then seeing Mr. *Coverdale*, the latter informed him that *James Wellesley* was in good health and was abroad; and added, that if witness wished to write to *James Wellesley*, he would forward it. The whole of this witness's testimony was contradicted by an affidavit of Mr. *Coverdale*.

This was all the evidence as to the Earl's information respecting the health of his son.

At the time when the deeds were executed, *James* had a small annuity. He was then indebted to several creditors. One of the creditors, a Mr. *Carrington*, made an affidavit, in which, after saying that for sixteen years prior to the death of *James Wellesley*, he was intimately acquainted with him, and was constantly consulted by him

1855.
 WELLESLEY.
 v.
 THE EARL OF
 MORNINGTON.
 ———
Statement.

upon his affairs, he deposed thus: "In the year 1846, and subsequently thereto, I was a creditor of *James*, and in that character I applied to the Defendant the Earl relative to *James's* affairs; and in August, 1850, the Earl informed me that it was his intention to execute a deed and make an appointment in favour of his son *James*, whereby the debts due from him would be paid; and in November following, the Earl informed me that he had executed deeds of appointment in favour of *James*; and the Earl then requested me to call upon the creditors of *James* and inform them of the provision made for *James* and for his creditors. I accordingly called on" (the witness named several persons, principally tradesmen), "all of whom were creditors of *James Wellesley*, and informed them that the Earl had executed a deed, by which they would obtain payment of the debts owing to them."

The amount of *James's* debts did not appear; but it was recited in a deed of assignment by the earl to the Defendant *Cutts*, dated February, 1854, that they were supposed to amount to about 3000*l*.

The deeds of November, 1850, were prepared by a Mr. *Murphy*. *Murphy* by his affidavit deposed, that, in 1850, he was a conveyancing clerk to Mr. *Keene*, who was then employed in several Chancery cases as the Earl's solicitor; that he (witness) had been and was private agent to the Earl, who on that account employed *Keene* as his solicitor; that he received instructions to prepare the deeds, in the absence of *Keene*, who had for some years previously been in *Ireland*; that, on *Keene's* return, witness handed him the deeds by the Earl's desire, and requested him to have them stamped, and acted upon by applying for a commission of lunacy against *James*; that the Earl was desirous of making a provision for *James* for his immediate maintenance, his only source of income being, as the Earl was in-

formed by witness, and as witness believed, attached by his creditors, and to alter his domicile, and bring him to *England*; that in January and February, 1851, witness had conferences with the Earl as to taking proceedings to obtain a commission of lunacy, and received instructions to proceed to obtain such commission, and with that view consulted counsel upon the subject, who suggested difficulties from the fact of *James Wellesley* being abroad. Witness deposed that he believed the reason why the deeds of appointment were not stamped soon after they were executed, and the commission of lunacy applied for, was, that the Earl had no pecuniary means of his own at that time, and *Keene* declined to advance any more money on the Earl's behalf; and witness believed that *Keene* did not afterwards advance any more money to the Earl or on his behalf.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Statement.

Mr. Coverdale deposed, that, on the 6th of November, 1851, *Keene*, who was then acting as solicitor for the Earl, called upon him at his office, and stated that he came for the purpose of inquiring whether *James* had left a will, to which witness answered, that he was not aware of the existence of any will; and that it appeared to him very immaterial, for he knew of no property *James* had to bequeath; and that *Keene* then stated that *James* was entitled to considerable property under appointments which the Earl had made in his favour.

Upon the question whether any communication was made on the part of the Earl to the Plaintiff relative to the deeds of November, 1850, or to the appointments thereby made, previous to the interview between the Earl's and the Plaintiff's solicitors, the evidence was conflicting. The Court, upon examination of the evidence, concluded that no such communication was made.

The Earl made an affidavit, in which he deposed, that,

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Statement.

prior to the execution of the deeds of appointment, he had been informed, and he believed, that *James*, upon his quitting *England* in 1845, had executed a will by which he had bequeathed all the property he might die possessed of to a lady with whom he was then living. And he deposed, that, at the time of the execution of the deeds, he believed that the said will was in existence.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Selwyn*, for the Plaintiff

The appointments of November, 1850, must be set aside. It is plain from the evidence, that neither of those appointments was made for the benefit of *James*; and if an appointment is not clearly made for the benefit of an object of the power, it cannot be sustained: *Lord Hinchinbroke v. Seymour* (a); and see the cases cited in *Rowley v. Rowley* (b).

Mr. *Bagshawe*, Q. C., and Mr. *Southgate*, for the Defendant, the Earl of *Mornington*.

The evidence does not shew that the Earl, when he made the appointments, was aware that his son's recovery was hopeless. In May, 1850, he received, through Captain *Westley*, information directly to the contrary. Col. *Bagot's* letter points to the danger of mental incapacity, not bodily disease; and although the Earl, as long ago as May, 1847, when the cause of the disease was uncertain, may have feared that *James* "was not long for this world," the fact that *James* had already survived the apprehended danger

(a) 1 Bro. C. C. 395. See also 335; and Lord *St. Leonards*, 4 as to *S. C.*, Lord *Eldon*, 11 Ves. Dru. & W. 55.
 479; Lord *Manners*, Beattie, 334, (b) *Kay*, 242.

or more than three years, may well have removed the apprehension, especially in a case like his, where the first form of the disease was mental imbecility—a malady by which means necessarily fatal to life.

1855.
WILLESLEY
v.
THE EARL OF
MORNINGTON.
Argument.

The appointments had a legitimate object—viz. to provide for the payment of *James's* debts, and for his future maintenance; and the Earl had been informed that the annuity—the only means of maintenance left to his son—had been attached by his creditors.

The deeds were not concealed. Before executing them, the Earl informed *Carrington* that he was about to execute such instruments, and shortly afterwards that he had done so, and desired him to inform the other creditors. Nor were the deeds unknown to the Plaintiff. The Earl deposes that in 1851, and, as near as he can recollect, in the beginning of the year, he wrote and sent a letter to the Plaintiff, and informed her of the fact of his having made a provision for her and her brother, by executing the two deeds; and that in such letter he stated the amount to which she was entitled under the deeds respectively.

The fraud charged is not sustained. It was impossible for the Earl to foresee that he was the party to be eventually benefited by the appointment to *James*; so far from it, he believed that *James* had left a will.

The case of *Campbell v. Home* (a) shews that appointments are not to be set aside lightly, upon vague suspicion that the party appointing may have hoped to derive some benefit from the deed. In *Butcher v. Jackson* (b), an appointment to a child only four days old was sustained; and so in *Fearon v. Desbrisay* (c).

(a) 1 Y. & C. C. C. 664, 669.

(b) 14 Sim. 444.

(c) 14 Beav. 635.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Argument.

Lord Sandwich's case proves no more than this, that a parent, having a power to fix the time when portions are to be raised, cannot appoint an immediate portion to an infant not in want of it, with a view to become entitled to it himself, as her personal representative, in case of her death: 2 Sugd. Pow. 194.

James was adult, and was in want of the portion, being largely indebted. There is nothing to rebut the presumption that these, like the earlier appointments of 1838 and 1840, were made, as the Earl deposes that they were made, "without any fraudulent, improper, or selfish motive whatever;" and that, in making them, "he was actuated by a feeling of duty to provide for his son, because of his then affliction."

Mr. *Lee*, Q. C., and Mr. *Druce*, for the Defendant *Cutts*, a purchaser of *James Wellesley's* interest, adopted the arguments of the Earl's counsel.

Mr. *James*, Q. C., for the Defendant *Gough*, an assignee of one *Edwards*, who claimed under a mortgage made to him by the Earl before the date of the appointments, denied fraud on the part of *Edwards*, and insisted he took *bonâ fide*.

Mr. *Daniel*, Q. C., for the trustees.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have been very anxiously considering this case, and I think it is impossible that the appointments of November, 1850, can stand.

I have been considering the case the more anxiously, because unquestionably I do not know of any case which can be said to be precisely similar in its circumstances to the one now before me.

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
Judgment.

After looking at all the observations made by various judges upon the case of *Lord Hinchinbroke v. Seymour* (a), I doubt whether it can properly be regarded as a case similar to the present. Lord *Thurlow*, in his judgment, does not put his decision upon the ground of fraud. He puts it upon the ground of the appointment being "against the nature of the power," "against the nature of the charge," the object of the power being to enable the parent to raise the money, when it should be necessary for the benefit of the daughter, e. g. upon her marriage, or the like. He says: "The meaning of a charge for children is, that it shall take place when it shall be wanted. It is contrary to the nature of such a charge to have it raised before that time; and although the power is, in this case, to raise it when the parent shall think proper, yet that is only to enable him to raise it in his own lifetime, if it should be necessary. It would have been very proper so to do upon the daughter's marriage, or for several other purposes, but this is against the nature of the power." And although Lord *Eldon*, referring to that decision, has remarked (b) that the daughter was in a consumption, and that "the Court was of opinion that the purpose of the parent was to take the chance of getting the money as her administrator," putting the decision upon the ground of fraud—upon the ground that the appointment was in effect for the parent's own benefit, yet Lord *Manners* has commented upon that remark in a case in *Beatty* (c), in which he says, he cannot think that Lord

(a) 1 Bro. C. C. 395.

(b) In *M'Queen v. Farquhar*,
11 Ves. 479. And the same
view is adopted by Lord *St. Leo-*

nards, C. L., in *Keily v. Keily*, 4
Dru. & War. 55.

(c) *Edgeworth v. Edgeworth*,
Beat. 334, 335.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Judgment.

Thurlow would have been silent as to the fraud, if it had constituted the ground of his judgment; and he implies from Lord *Thurlow's* language, that he decided the case on a principle applicable to every power of that nature; that principle being, that the whole object for which the power was created must be looked to; and the Court will not allow it to be exercised at a time not intended by the person creating the power; although, therefore, there was that power given to raise the money during the lifetime, it was not, upon the whole construction of the instrument, intended that the money should be raised during the lifetime, except for some particular purpose and object, which in that case did not occur.

This case, therefore, must certainly be rested—and it is painful that it should be so rested—upon the ground of fraud on the part of the parent: I mean, not simply upon the ground of the appointments not being for the child's benefit, but upon the broad ground that the parent executed these appointments, not with any intention of benefiting the object of the power, but to secure to himself the benefit that might result from the appointments so executed.

Now, how does the case stand with respect to evidence on that point?

[His Honour then entered into a minute analysis of the evidence; and, in the first place, of the evidence bearing upon the Earl's information as to the state of his son's health previous to and at the time of the execution of the deeds of November, 1850.

Col. *Bagot's* letter was open, in some respects, to the comment made upon it, that it indicated alarm as to *James's* mental condition, rather than as to his bodily health. But another observation of considerable importance arose upon that letter with reference to Lord *Mornington's* conduct

in the later stages of the transaction. In 1847, Lord *Mornington* was anxious to know how his son was, and the letter showed what he then thought the proper course to take for that purpose; he wrote to a relative, and directed him to make inquiry of the physician in attendance on his son. At a subsequent stage, in 1849 and 1850, no such course was adopted by Lord *Mornington*.

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
—
Judgment.

In regard to the Earl's letter to the Plaintiff, there was justice in the remark, that apprehensions, entertained at an early stage of such a disease, when the cause of the disease was doubtful, might in a period of more than three years have been removed. But Dr. *Davison's* evidence was clear as to the cause of this disease; that it was caused by bodily debility, occasioned by early excesses; not a case, therefore, in which the cause was doubtful.

In July, 1848, Lord *Mornington* was distinctly informed by the best authority he could procure—Dr. *Davison*, the physician who had seen his son at *Turin*—that he was “in a deplorable state of health,” that it was owing to excesses—nothing, therefore, that was likely to be remedied—and that the probability was, that he would not recover, although such cases did sometimes recover. From that time to the execution of the deeds in November, 1850, it did not appear that Lord *Mornington* (whose inquiries, addressed in 1847 to his son's physician through Col. *Bagot*, and in 1848 to Dr. *Davison*, shewed plainly that he knew what course to take when desirous of obtaining information on the subject,) had ever made, directly or indirectly, any inquiry of any person as to what was the continuing state of his son's health, with the single exception of the inquiry deposed to by Captain *Westley* as having been addressed by him to Mr. *Coverdale*,—the fact of which was distinctly denied by the latter, and the alleged reply to which was so utterly improbable, that the Court could not possibly believe the

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Judgment.

memory of the former witness to be correct. His Honour then resumed.]

Then, in November, 1850, these two appointments are made, and they are made certainly under circumstances of a most singular character. Nobody apparently had pressed this unfortunate gentleman with respect to the payment of his debts, and pressed he could not be in his lunatic condition. There were debts, and there were creditors apparently complaining, for that is in evidence. *Carrington* and other creditors were complaining; but he had not been molested by any body, nor did Lord *Mornington* make any inquiry how far he was troubled, or how far his income had been reduced. It is said that he found the remaining portion of his son's income attached or liable to attachment, and that he would be left in destitution; but he held no communication upon the subject with any body who took the slightest interest in his son. The only communication is with a creditor named *Carrington*. But *Carrington* does not go on to swear that he ever threatened any process or anything of the sort, or that he told Lord *Mornington* that any body else threatened process. I have the whole of Mr. *Carrington's* affidavit before me, and all that took place was this. [His Honour read the affidavit.] There is not the slightest suggestion by *Carrington* that either he or any other person was pressing for payment. He simply says, 'I inquired as to his affairs. I wanted to know what situation they were in;' and the answer he got was this:—'I have made a provision for the creditors of my son.' What is the provision that is made for the creditors of his son? It is made under no pressure at all from the creditors. It is recited in the deed to Mr. *Cutts*, that it was supposed that the debts were about 3000*l*. No evidence is given by Lord *Mornington* as to what they were, nor do I know that he says what he supposed them to be. Nevertheless, he states (and it is the only ground suggested for the execution of

these deeds), that in order to make provision for the payment of these debts and the future maintenance of his son—as to which maintenance he had been making no inquiry whatever, and the debts being now believed to be about 3000*l.*, and he not giving me any information of his ever supposing that there was anything more—he executed two deeds directing that there should be immediately raised for the benefit of that son no less than 27,000*l.*

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Judgment.

I quite concede that deeds are not to be set aside for fraud on vague suspicion, and the case I have been referred to—*Campbell v. Home* (a)—was that, and nothing more. A trustee had said: ‘I suspect some arrangement has been come to between this lady and her daughter, and I will not hand over the fund.’ The answer of the *Vice-Chancellor* was, ‘Let the parties who question the appointment come forward and question it. I shall not on this vague surmise allow the trustee to withhold a fund which has thus been appointed, merely because he says he entertains vague suspicions. Let the parties who are interested in the discussion come forward.’ That is what the parties who are interested in the discussion are doing here. They are coming forward to dispute it, and the dispute is distinctly upon this ground:—‘You have made this appointment of 27,000*l.* without any intention whatever of benefiting your son. You have made it for the sole purpose of obtaining a benefit to yourself.’

The case must rest on ground as high as that, and I put it as high as that. I ask, can any body, if this case were before a jury, suppose that the defence which is made would be a satisfactory answer, with reference to an appointment to a person in this imbecile condition—a lunatic, who was in a weak and infirm state of health, brought on by excesses? The father had been informed throughout that the weakness and infirmity of his son’s health was so occasioned; and

(a) 1 Y. & C. C. C. 664.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Judgment.

having made due inquiries at two previous periods as to the state of his health, he makes no inquiry at the time when he is about to execute these deeds. Can I believe, or will any body believe, that this was done for the purpose of paying the supposed amount of debts, 3000*l.* or 4000*l.*, when one finds an appointment made of 27,000*l.*, and when one observes (which is of considerable importance) the course which was taken after the appointment was so made?

But before coming to that, I cannot help noticing another circumstance of a remarkable character. The Earl had a solicitor, Mr. *Keene*. Mr. *Keene* did not prepare the deeds; they were prepared by *Murphy*, a clerk of his, in his absence. The clerk explains in some degree how it happened. [His Honour read *Murphy's* affidavit, as stated above.] Mr. *Murphy* says the deeds were executed; they were not stamped; they were handed by him to Mr. *Keene*, his employer, to be stamped; they remained with Mr. *Keene* to be stamped; and he believes Mr. *Keene* did not proceed in the matter, either as to stamping them, or as to obtaining a commission of lunacy, because Lord *Mornington* could not furnish him with funds for that purpose, and he was not prepared to do so without having funds furnished. Mr. *Keene* is not examined; he makes no affidavit to substantiate any one of these motives, or account for the non-proceeding with the deeds. As I have said, they are executed, and they are left in their unstamped condition.

But what is much more remarkable, and affords the strongest corroboration of the suspicion attaching to these antecedent circumstances, is, that, after the execution of the deeds, no notice of them is given to any person whatever, that I can find, except Mr. *Carrington*, who appears to have been a friendly creditor of *James Wellesley's*, and in friendly communication with Lord *Mornington*. Mr. *Carrington* is told of them, and he is requested to tell

the other creditors. The antecedent circumstances, that Lord *Mornington* instituted no inquiry about the health of his son, that he made no inquiry of any of his friends as to how far the provision was wanted or was not wanted, and that he knew (as far as he knew anything) that there were debts to the amount of 3000*l.* only, as to which there is no evidence of any pressure, and as to which an appointment of 27,000*l.* could not be required; are pregnant in every respect with suspicion of the gravest character. But those circumstances, so pregnant with fraud, are prodigiously strengthened by the fact, that these deeds, to take effect immediately, were not communicated to anybody who was to put them in force or raise the money. Lord *Mornington* could not be in ignorance who were the persons to be applied to. It is true the trustees were dead; but it is recited in the deeds of appointment who were the executors of the last surviving trustee. They are recited to be Lord *Raglan*, Lord *Dartmouth*, and Mr. *Sneyd*. To any one of those gentlemen application would naturally have been made at the time, saying, "My son is in a precarious state of health. I am anxious to have a fund raised on his behalf for the purpose of bringing him home and putting him under the protection of the Court of Chancery. I wish his debts to be paid immediately. I have executed a deed of appointment for that purpose, and I call upon you at once to take all proper steps to raise the money." The deeds were not communicated to Lord *Wellesley*. It is said, and Lord *Mornington* complains greatly of it in his answer, that by the proceedings of his son, Lord *Wellesley*, he has been kept out of possession of his life interest in this large estate. But if he thought himself wrongly out of possession, his interest would rather be adverse to those in possession, and induce him to take steps that the fund which he wanted to raise for the benefit of his younger son should be forthwith raised. Neither does Lord *Mornington* communicate the deeds to his daughter. It was his business to prove that such a com-

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
Judgment.

1855.
 WELLESLEY
 v.
 THE EARL OF
 MORNINGTON.
 Judgment.

munication was made; and I have her positive oath that she received no such communication. [On this point the evidence was conflicting. His Honour fully examined it, and concluded thus:] I give full credence to her statement; and I am bound to hold that no such communication was made to any person interested except the single creditor, *Carrington*, the amount of whose debt does not appear; for he does not tell us whether it was 100*l.* or 20*l.*

Thus things remain up to the death of Mr. *James Wellesley*; and now observe how matters stood at his death. For anything that anybody knew (subject, of course, to Lord *Mornington* having mentioned the fact to *Carrington*), as to the existence of the deed from having seen it, or from its having been produced, it was perfectly competent to Lord *Mornington* to take care that these deeds should never appear at all. Nobody had any knowledge of the deeds except *Murphy*, who prepared them; for Mr. *Keene* has not told us when he obtained possession of them. All we know is what Mr. *Coverdale* tells us of *Keene's* waiting upon him, and telling him he had got possession of them. But, how was this done? What is the first thing *Keene* says to Mr. *Coverdale*? It is not, "There are deed of appointment;" but it is an inquiry, "Is there any will? And when he is told that there is no will, then the deed of appointment are mentioned; and that is the first time they appear to have been mentioned to anybody except this friendly creditor, Mr. *Carrington*."

Lord *Mornington* suggests that it was impossible he could have had a notion that he was to be the party to benefit by these instruments, because he had heard and believed that his son had, previous to his lunacy, made will, by which he had given the whole of his property to a person with whom he had lived. I confess that it is one of the most extraordinary statements in the case, that Lo

Mornington, believing his son's debts to be only 3000*l.*, to the detriment of his daughter Lady *Victoria*, appointed to him in this state 27,000*l.*, in the belief that the surplus would go to a woman with whom his son had been living. Anything more monstrous and incredible was never tried in a Court of justice. Sorry should I be to believe that Lord *Mornington* desired in this state of things to make an appointment of this large sum of 27,000*l.*, which certainly was not required for the payment of the son's debts, those debts amounting only to 3000*l.*;—I say I should be sorry to believe that he desired to make this appointment of this very large sum of money, with the full impression that if his son died, the surplus—more than 20,000*l.* would go over to some person with whom his son had been living. It is a statement that I cannot possibly credit for a moment, and I think that the suggested defence utterly falls to the ground. But it is not by any means an inconsiderable statement in weighing the question whether a fraud has been committed in this instance, because it proves to what straits a person is driven who makes a statement of this sort in order to justify the act which he has committed. I am not imputing fraud on mere ground of suspicion, but I find the large sum of 27,000*l.* appointed to this son, not merely without any legitimate object within the power, but upon alleged reasons which, to my conviction, are utterly untrue; and if these alleged reasons are utterly untrue, I must of course say that there was no better reason to state; and, if there is no better reason to state, the appointment was not made for the son, but for the father. Lord *Mornington* alleged those reasons to be, that he wished to provide for the debts. Upon the extreme improbability of that, I have already commented. He has alleged, also, his belief that the residue would have gone over in the manner I have ascribed, and, in addition to the circumstance that those alleged reasons so utterly fail, I find (as I have said before) a

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
Judgment.

1855.
WELLESLEY
v.
THE EARL OF
MORNINGTON.
Judgment.

remarkable circumstance which clenches the whole matter, that, when these deeds are executed, they are not communicated to any person whatever to whom they ought to have been communicated, until the event occurs which is to put Lord *Mornington* into possession of this considerable property.

Holding, therefore, as I do, that the appointment has been made by Lord *Mornington*, not for the benefit of his son but for his own benefit, it seems to me consistent with the whole class of authorities, and to follow the principle of the class of authorities, in which the object of the power was capable of entering into a bargain with the father, which this unfortunate gentleman was not—to hold that this is a fraud upon the power, that it is an exercise of the power by which the father endeavoured to obtain a benefit for himself, which of course the Court will not allow him to retain; and the consequence is, that the deeds must be set aside, and Lord *Mornington* must pay the costs of this suit.

1855.

RAWORTH v. PARKER.

BY an indenture, dated the 22nd of April, 1853, between *Joseph Raworth* of the first part, the Defendants of the second part, and the several persons whose names should be thereto subscribed and set, being respectively creditors of the said *Joseph Raworth*, of the third part, the said *Joseph Raworth* conveyed certain freehold hereditaments therein described to the Defendants, their heirs and assigns, and assigned to them all his personal estate upon trust to sell the said freehold and leasehold estates respectively as therein mentioned; and out of the proceeds of the sale thereof to pay off certain mortgages upon the same respectively, and upon trust to return to the said *Joseph Raworth* part of his furniture, to the value of not more than 20*l.*; and to sell and convert into money the rest of his personal estate, and to apply the same and the residue of the proceeds of the sale of his freehold and leasehold estates in paying the costs and expenses of administering the said trust as therein mentioned, and subject thereto in trust to pay and divide the said trust funds unto and among all and singular the creditors of the said *Joseph Raworth* in rateable proportion, according to the amount of their respective debts, subject nevertheless to the covenants and provisions thereafter contained:

Dec. 20th.
& 22nd.

Creditors' Deed—Time for Execution—Power to enlarge Time—Motion for Decree—Evidence.

A creditors' deed contained a proviso, that such creditors as should not execute or assent in writing to the deed on or before a certain day, or within such further time, not exceeding thirty days, as the trustees should appoint, should be excluded from the benefit of the deed. The trustees issued an advertisement, which stated their power of extending the time for execution. The debtor

owed his son a large sum of money. The son was in America at the date of the deed. A solicitor who had acted for him when in England, on the last day for execution, wrote to the trustees on behalf of the son, signifying his assent to the deed. Subsequently he received from the son a power of attorney to execute the deed, and before the end of the period for which the trustees might have enlarged the time for executing the deed, he applied to them to permit him to execute on behalf of the son:—*Held*, that the son was entitled under these circumstances to the benefit of the deed, because it was the duty of the trustees to enlarge the time, so as to allow his attorney to execute the deed: *Dunch v. Kent*, 1 Vern. 260, observed upon.

When a cause is heard upon a motion for decree, the Court has power to order the hearing to stand over to prove the execution of a deed.

1855.
 RAWORTH
 v.
 PARKER.
 —
Statement.

Provided nevertheless, and it was thereby agreed and declared by and between the said parties thereto, that such creditors of the said *Joseph Raworth* as should not execute or assent in writing to take the benefit of the said now stating indenture on or before the 22nd day of July then next, or within such further time, not exceeding thirty days, as the Defendants or the survivors or survivor of them should, by writing under their or his respective hands and seals or hand and seal, declare, should be excluded from all benefit under the now stating indenture; and the same deed contained a proviso for the release of the said *Joseph Raworth* from all claims of the creditors who should execute or take the benefit of the same.

The Plaintiff *Robert Raworth*, a son of *Joseph Raworth*, was a creditor of *Joseph Raworth* for a sum stated to be more than 4000*l*. The trustees executed the deed, and shortly afterwards caused an advertisement to be inserted in the *London Gazette* and a daily *London* newspaper, and in a provincial newspaper published at *Sheffield*, in which advertisement it was stated that such creditors of *Joseph Raworth* as should not execute the said deed on or before the 22nd of July then next, or within such further period as the said trustees should declare, would be excluded from all benefit under the same.

Previously to the execution of the deed, *Robert Raworth* had absconded from this country, and was in *America*. His mother, Mrs. *Raworth*, wrote to him there, and informed him that it was probable that *Joseph Raworth* would be made a bankrupt, or would have to execute an assignment in favour of his creditors. Mrs. *Raworth* deposed that her son wrote in answer to this letter, requesting her to get *Wheat* to prepare and send out a power of attorney to enable *Wheat* to receive his father's debt to him, and to pay it over to Messrs. *Daubuz & Co.*, to whom *Robert Raworth* was largely indebted; but this letter

was not forthcoming. *Wheat*, who had acted as solicitor for *Robert Raworth* when he was in this country, on the 22nd of July, 1853, wrote to the Defendant's solicitors, intimating his assent to the deed as the attorney of *Robert Raworth*. The firm of *Daubuz & Co.* were creditors of *Robert Raworth* for more than 4000*l.*; and on the 27th of May, 1853, *Wheat* sent a power of attorney to *Robert Raworth* in *America*, authorising *Wheat* to execute the trust deed, and to receive the dividends payable to him thereunder; and to pay the same to the firm of *Daubuz & Co.* in discharge of *Robert Raworth's* debt to them. This power of attorney reached *Robert Raworth* on the 1st of August, 1853, and was sent back to *England* apparently executed by him, and was received by *Wheat* on the 15th day of the same month; and on the 18th of the same month *Wheat* applied to the Defendants to be allowed to execute the deed, at the same time informing them of the power of attorney which he had received. However, the trustees and the other creditors who had signed the deed refused to allow him to do so, and thereupon the present bill was filed by *Robert Raworth* and the representatives of the surviving partner in the firm of *Daubuz & Co.*, who had recently died, against the trustees, praying that it might be declared that *Robert Raworth* had duly assented to and was entitled to execute the deed for the benefit of the representatives of the surviving partner in the firm of *Daubuz & Co.*, and for consequential relief.

1855.
 RAWORTH
 v.
 PARKER.
 —
Statement.

Mr. *Daniel*, Q. C., and Mr. *Bagshawe*, jun., for the Plaintiffs, contended that the Plaintiff *Raworth* had assented in time, or, if not, that it was the duty of the trustees, under the circumstances, to exercise their power of extending the time; or that it was a case in which a Court of equity would relieve the Plaintiffs, on the ground that the Plaintiff

Argument.

1855.
 RAWORTH
 v.
 PARKER.
 —
Argument.

Raworth was prevented from executing the deed in time by the accident of his being absent abroad. In the following cases, creditors who had not executed within the specified time were allowed to take the benefit of the deed: *Dunch v. Kent* (a), *Spottiswoode v. Stockdale* (b), *Watson v. Knight* (c), *Broadbent v. Thornton* (d).

Mr. *Rolt*, Q. C., and Mr. *J. J. H. Humphreys*, for the Defendants, argued that the Plaintiff's case was, that he had assented to the deed in time; and therefore he could not claim relief on the ground that he was not able to assent in time. They commented on and distinguished the cases cited, and urged that there was no ground for treating deeds of this kind as less binding than any other deeds. [VICE-CHANCELLOR.—Have not these deeds been viewed rather as a guide and direction to the trustees?] Then in every case in which all the creditors did not execute within the limited time, the trustees could not safely act under the deed without the direction of the Court of Chancery. They urged that the proper remedy for a creditor who conceived himself wronged, would be to file a bill to impeach the transaction. All the cases in which creditors who did not execute had been admitted to the benefit of deeds of this kind, were cases in which the creditors, relying on the deed, with the knowledge and assent of all parties, had put themselves in such a position as that they could not, from lapse of time or otherwise, recover their debts except by virtue of the deed: *Forbes v. Limond* (e). The creditors who actually executed were the persons whose interest should be considered. Many of them were probably induced to do so by the expectation that a few creditors only would execute the deed, and divide the property comprised in it.—They cited *Collins v. Reece* (f), *Bush v. Shipman* (g), *Lane v.*

(a) 1 Vern. 260.

(b) Coop. 102.

(c) 19 Beav. 369.

(d) 4 De Gex & S. 65.

(e) 4 De Gex, Mac., & G. 298.

(f) 1 Coll. 675.

(g) 14 Sim. 239.

Husband (a). Johnson v. Kershaw (b), Gould v. Robertson (c), and Nicholson v. Tutin (d).

1855.
RAWORTH
v.
PARKER.
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I will first state what facts I consider to have been proved in this case, that I may clearly shew the grounds upon which my judgment proceeds.

The execution of the power of attorney has not been proved, but the case has been properly argued upon the assumption, that the power of attorney has been duly executed, because, this being a motion for a decree, I have power to order the cause to stand over to produce the necessary evidence of that fact. Subject to that, the facts proved are, that a deed was executed on behalf of the creditors of the father of the Plaintiff *Raworth*, by which it was provided that all creditors were to be excluded from the benefit of its provisions, who did not execute or assent in writing thereto before the 22nd of July then next, or within such further time not exceeding thirty days as the trustees should by writing declare. It is proved that the Plaintiff *Raworth* was a creditor for a considerable sum—it is stated to be 4000*l.*; but the trustees deny that it is half that amount. An advertisement for creditors was published, the wording of which it is important to notice. It was stated that such creditors of *Joseph Raworth* as should not execute the deed “on or before the 22nd of July, or within such further time as the said trustees should declare,” would be excluded. Notice was therefore given to all the creditors of the power of the trustees to extend the time for the admission of creditors to execute the deed. Then I take it to

(a) 14 Sim. 656.

(c) 4 De Gex & S. 509.

(b) 1 De Gex & S. 260.

(d) *Supra*, p. 18.

1855.
 RAWORTH
 v.
 PARKER.
 —
Judgment.

be proved—for there is no ground to disbelieve the statement of Mrs. *Raworth*—that she informed the Plaintiff her son, by letter, of the probability of his father being made a bankrupt, or of some such deed being executed. That letter was written before the deed was executed, and therefore could not communicate to him the fact of such execution. It was argued that the Plaintiff cannot pretend that he had not time to execute, because his case is, that he actually sent notice of his assent to the deed; but it appears to me that if he sent his assent, it was on being informed of the probability only of the deed being executed.

I do not, however, take it to be clearly proved that she received in answer a letter from the Plaintiff, stating that he wished a power of attorney to be prepared, and that instruction should be given to *Wheat* for that purpose. I think that this is not proved, because Mrs. *Raworth* says that she has lost that letter, and it is not stated that she gave instructions accordingly, or acted upon that letter. All I consider to be proved is, that she was very desirous that her son's debt should be provided for by the deed, for particular but very legitimate reasons; and that accordingly she waited upon *Wheat*, and induced him to prepare and send out to her son a power of attorney. I take it to be proved that such power was sent out. It is said he did not receive this power for some time after it reached *America*. The evidence as to that might have been more distinct. It was not executed until August. On the 22nd of July, which was the last day named in the deed for creditors to come in and execute unless the trustees should enlarge the time, *Wheat* wrote a letter to the trustees, saying that he assented to the deed on the part of the Plaintiff. He was asked whether he had authority to do so. He stated that he had not any direct authority. It is sworn by the Plaintiff's mother that *Wheat* was the solicitor of the Plaintiff. However, it is proved that some one on behalf of the Plaintiff,

without any authority from him, applied for the benefit of the deed on the last day for his executing it, and did not apply for further extension of the time.

The next thing proved is, that *Wheat* received the executed power of attorney on the 18th of August, the date to which the time for executing the deed might have been further extended being the 30th; and he then wrote to the trustees to inform them that he had received the power of attorney, and to claim to execute the deed on the 19th.

The law applicable to these deeds is in a state which is not satisfactory; but this case does not appear to me to require a decision of any doubtful point of law, because the Plaintiff, as I think, has brought his case within a principle which is well settled. Independently of the case of *Dunch v. Kent* (a), it has been decided that Courts of equity allow considerable latitude of construction to deeds of this kind. Although they provide that such creditors only as seal and deliver the deed shall have the benefit of it, this Court holds that it is not necessary to seal or deliver the deed, provided the creditor assent to it. Lord *Eldon*, in *Spottiswoode v. Stockdale* (b), decided that it could not be alleged by the debtor that the deed, though void at law, was not sustainable in equity, the creditors having acted under it, and treated it as valid, though there was a provision in the deed that it was to be void if all the unsecured creditors should not execute or otherwise accede thereto within a given time, which had elapsed without their complying with the condition. Lord *Eldon* admitted, upon a plea being put in by the Defendant in that case, that the deed was void at law; but as the creditors had acted under it, he held that the deed was clearly sustainable in equity. The case, however, only decides that it does not lie in the mouth of the debtor, under such circumstances, to dispute the validity of the deed.

1855.
 RAWORTH
 v.
 PARKER.
 Judgment.

(a) 1 Vern. 260.

(b) Coop. 102.

1855.
 RAWORTH
 v.
 PARKER.
 —
Judgment.

The circumstances, too, of that case were very strong. It appeared that, shortly after the execution of the deed, the debtor had himself given to the Plaintiffs a list, which he said included all his creditors; but subsequently the Plaintiffs had discovered that there were other creditors not included in the list, who, by this means, through the default of the debtor, did not execute the deed in time, although they did so on being afterwards applied to. There is no modern authority in which relief has been given after the time fixed for the execution of the deed has expired. In *Collins v. Reece* (a), the Vice-Chancellor observed, that there was probably some error in the report of *Spottiswoode v. Stockdale*, because Lord *Eldon* is stated to have said that the plea in that case relies on the non-execution merely; whilst, on looking at the plea, that does not seem to have been the case. According to the report, the bill stated that the Plaintiffs, since the time for execution, had caused applications to be made to the creditors not included in the list, requesting them to become parties to the deed, and in consequence of such applications, they executed the same accordingly. All I think that Lord *Eldon* meant was, that the plea did not meet the case of a subsequent assent, but a defect in the prior assent; and that as all the creditors had then assented, the debtor could not avail himself of the objection. As to the later authorities, there is a strong opinion expressed in *Collins v. Reece* that the time limited for execution of the deed is essential; and if creditors do not execute within that time, they will be excluded from the benefit of the deed in equity; and the reason given for this is, that creditors who execute the deed on the last day do so on the faith that the property is to be divided among the few who have executed, and that others will not be let in afterwards. That may be an important question to decide when it arises. It may be observed, however, that if the

(a) 1 Coll. 675.

editor has executed before twelve o'clock at night on the
st day, he is still liable to have the deed executed by
thers up to that time.

1855.
RAWORTH
v.
PARKER.
Judgment.

The older authority of *Dunch v. Kent* (a) is more difficult
o deal with. In that case the Crown was indebted to *Col-*
vile, and *Lindsey* had married the executrix of *Colvile*, and
ould therefore be entitled in right of his wife to that debt.
he Crown made to *Lindsey* a grant of a perpetual rent to
est the debt, subject to a trust for *Colvile's* creditors. A
ote in *Raithby's* Edition gives the amount of the rent as
ore than 5000*l.* a year. There was a trust imposed
at the creditors of *Colvile* should be paid if they came
within a year. It was intended to give the executrix
f *Colvile* the benefit of the rent; but as *Colvile* had be-
come greatly involved, probably owing to the delay in
ayment of this debt due to him from the Crown, it was
ought right that a provision should be made for his cre-
tors, and the property was given to the husband of his
ecutrix, upon condition of her paying those creditors who
ould come in within a year. A bill was then filed by
editors who came in afterwards, and the Court held that
ose creditors should have the benefit of the grant; and
enever the exact point arises for decision, that case will
ve to be considered; and if it be held that creditors are
t admissible after the prescribed period, I think that
Dunch v. Kent must be overruled.

But I do not think that this case requires the aid of autho-
ty. On what principle has equity given relief? A debtor
tends by a deed of this kind to provide for all his creditors.
he intention of the creditors who execute may be different.
hey may be inclined to give their assent, because they are
xious for a speedy distribution of the property. They can-

(a) 1 Vern. 260.

1855.
 RAWORTH
 v.
 PARKER.
 —
Judgment.

not be held to intend to exclude a bonâ fide creditor who comes in within a reasonable time, though it may be said that they executed on the faith that a few creditors only would execute the deed. What is the duty of the trustees? Clearly, whether themselves creditors or not, they ought not to desire the exclusion of any. Accordingly, in this case they issued an advertisement, and they did not thereby inform the creditors that those who executed before the 22nd of July would have all the property, and that the other creditors would be excluded; but they intimated that the trustees had the power of extending the time within which the creditors were to execute. I think, therefore, that this case differs in this respect from the other authorities. The trustees knew that the Plaintiff *Raworth* was a large creditor, that he was abroad, having absconded, and could not easily be communicated with. They knew that his friends were anxious that he should be let in under the deed. A demand was made on his behalf at a time when they could have extended the period for executing the deed. I do not think that this is like a case of arbitration, or that it is quite clear that they could not afterwards have extended the time; but I assume that they had power to do so up to the 22nd of July, and not afterwards. What was their duty? They felt that they were bound to let all the creditors have fair notice of the deed. They knew that there was a large creditor whose friends were anxious that he should be let in, who could not easily be communicated with; and that the only information he had of the matter was, that such a deed was likely to be executed. It seems to me that under these circumstances it was the plain duty of the trustees to enlarge the time for executing the deed. I therefore think that this case is free from the difficulties which might otherwise have arisen. There seems to have been no necessity for an immediate realisation of the property, nor any other circumstance to prevent the trustees extending the time; and I am of opinion that it would be a

re from every principle of equity to say that trust-
 ed if they are themselves creditors it would amount
 than a mere disregard of their duty as trustees—
 berty, by refusing to extend the time, to exclude a
 who, as they knew, was prevented by his absence
 from coming in within the time. I do not impute
 any intention to them; they were acting on behalf
 of the body of creditors; but when they were aware
 the Plaintiff was such creditor and was at a distance,
 they had the power to give him an opportunity of
 attending his case, it was their duty to do so.

1855.
 RAWORTH
 v.
 PARKER.
Judgment.

Defendants waived further proof of the execution of
 power of attorney, and the following is a minute of the
 made:

AND that the Plaintiff is entitled to the benefit of the deed
 such debt as he shall establish.

*Minute of
 Decree.*

and what is now due to the Plaintiff, and all other the cre-
 dited to come in under the deed.

and an account against the trustees of their receipts and pay-

and of the suit to the hearing out of the fund. Reserve subse-
 quent costs.

Dec. 7th &
11th.

EVANS v. BREMRIDGE.

*Co-sureties—
Execution of
Deed by one
only—Alteration
of Position—Equita-
ble Relief.*

The relief granted in equity to one of two sureties in a deed, whose position has been altered by the acts of the creditor, is to have the deed delivered up to be cancelled.

Where the creditor had prepared the deed, so as to shew, on the face of it, that it was intended to contain a joint and several covenant by two co-sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other surety, and had not informed the surety who had executed

it of this fact; but, on the contrary, had afterwards written to him as "one of the sureties of the principal debtor having become insolvent:—*Held*, that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant.

Seem, that if a creditor release by deed one of two sureties, who are jointly and severally liable, the other is also discharged.

The dicta to the contrary in *Ex parte Giffard*, 6 Ves. 805, have not been followed.

IN 1849, the Reverend *George Elton* applied to the *Anchor Assurance Company* for the loan of 210*l.* they consented to make such loan upon the terms that he should effect a policy of assurance with them for his life for the sum of 400*l.*, and should assign the same to the trustees for the company, and should procure two reasonable persons to join him in covenants for the repayment of such loan and interest by instalments and for the payment of the premiums on such policy of assurance. *Elton* then applied to the Plaintiff to become one of such sureties, stating that one *William Bradley* would be the surety; and the Plaintiff assented to such request. Thereupon he gave to the company the names of the Plaintiff and of *William Bradley*, who was an uncle of *Elton*, as his proposed sureties for such loan; and the company assented to make such loan, and prepared a policy of assurance on the life of *Elton*, and also an indenture dated the 22nd of February, 1849, and which purported to be made between *Elton* (who was thereafter, for the sake of brevity, styled "the said borrower,") of the first part, the Plaintiff and the said *William Bradley* (sureties of the said borrower) of the second part, and the Defendants *Brembridge*, *Wertheimer*, and *Wilson* of the third part; and then after reciting that by a policy of assurance of the *Anchor Assurance Company*, dated the 22nd of February, 1849, and numbered 1189, the funds and other property of

will in a legacy of 2500*l.*, and in some residuary estate, was bound by the covenant of herself and her husband, contained in the settlement made previously to their marriage? This question turned upon the point whether or not, construing the recitals of that settlement together with the terms of the covenant, a contingent interest of this description would be bound by it? The contingent interest was created by a bequest to all and every the daughter and daughters of *Andrew Du Moulin* living at the time of his death who should attain the age of twenty-one or marry, equally, as tenants in common; and there were provisions for applying the income of the shares in maintenance, and also for making advancements to the children out of their expectant shares, and the residue was given in the same terms. I have no doubt that this bequest did not confer a vested interest on the daughters. If the words had been, to such of the daughters as shall be living at their parent's death, numerous authorities shew that such a description of the party is involved in the gift, and those only can take who answer the description at the time when the event happens. *Sturges v. Pearson* (a) is a case of a different kind. The will there contained a gift to one for life, with a direction to pay and divide it among her three children at her death, which was clearly a vested interest; but there were also the words, "or such of them as shall be living at her death;" and the Vice-Chancellor held that the interest was vested, that the subsequent words only raised a doubt, and could not divest the interest given. In this case, the gift is simply to be divided among the daughters living at the death of their father. There is no other gift, nor is the gift to any person except those who answer that description. There is super-added a further condition, that the parties to take should attain twenty-one, or marry; but the circumstance of their attaining that age or marrying did not obviate the neces-

1855.

ATCHERLEY

v.
DU MOULIN.

Judgment.

(a) 4 Madd. 411.

1855.
 ATCHERLEY
 v.
 DU MOULIN.
 Judgment.

sity of their coming within the description of persons living at the death of their father. The children, therefore, had nothing during the life of their father but contingent interests. The recital in the settlement is, that it had been agreed that the intended husband and wife should covenant with the trustees to settle all such personal estate as the intended wife or the intended husband in his right should be or become entitled to in manner thereafter mentioned and expressed. There is a separate witnessing part, after settling some of the intended husband's property, whereby the intended husband and wife covenant that in case the intended marriage shall take effect, and they the intended husband and wife, or either of them in her right, should at any time or times during the said intended coverture be or become entitled to any personal estate of the value of 100*l.* or upwards at any one time, the same should be forthwith vested in the trustees for the time being upon certain trusts therein mentioned. I think that those words "be or become entitled," entirely obviate the question raised in some of the cases, whether the settlement is not intended to refer only to future property. The words "be or become" take in any property to which the intended wife was actually entitled at the time of the settlement. *Grafftey v. Humpage* (a) was decided on a distinct principle against the claim of the husband claiming in right of his wife, by virtue of the marriage, certain property which fell in afterwards. Lord *Langdale* held that the intention of the settlement was, that the husband should bind himself to settle everything which he acquired by virtue of his marital right, and therefore the interest which had accrued, although it had not been reduced into possession during the marriage or by the husband surviving, was bound by and included in the settlement.

With respect to the other point, as to which the case of

(a) 1 Beav. 46.

Leon v. Gassiot (a) before the Lords Justices was cited, i.e., at, by a general assignment of all personal property, a contingent right of this description would pass, that is subject to the question whether or not I can find upon the whole of this settlement that there was an intention to include in it all the property of the wife, or whether the intention was not rather to settle all the property to which the wife might be entitled in any shape or manner during the marriage. It is quite clear that she did not intend to settle all her future property, including any to which she might become entitled after the determination of the marriage: she intended to settle all that she was then or might afterwards become entitled to during the marriage. I think I should be stretching the words of this settlement too far if I gave any other construction to them. The words are, "all the property she should be or become entitled to." Now, by virtue of this gift of the testator, although she had the transmissible contingent interest, she had nothing during the marriage which could be called property to which she was entitled; and unless I can find something in the settlement to enlarge the meaning of these words, so as to include prospective and contingent rights, I think that this contingent interest will not be bound. The father of Mrs. Atcherley was alive during her marriage, and therefore during all that period she had only a possibility of enjoying his bequest. The word "entitled" might be large enough to include a contingent interest, if the other words of the settlement showed that it was intended to have that effect; but when I find the words are, that whatever she should be or become entitled to during her coverture is to be vested in the trustees upon the trusts expressed in this settlement, it is impossible to say that such a provision comprises anything more or other than what should so become her property as to admit of being dealt with upon the trusts of

1855.
ATCHERLEY
v.
DU MOULIN.
Judgment.

(a) 3 De G., Mac., & G. 958.

1855.
 ATCHERLEY
 v.
 DU MOULIN.
 —
Judgment.

the settlement. It is very questionable whether such a covenant would comprehend even a reversionary interest: certainly this contingent possibility is not within the words or spirit of the settlement.

Dec. 5th.

CROFTS v. MIDDLETON.

Will—Contingent Remainder—Married Woman—Acknowledged Deed—Estoppel—Contract—Acquiescence.

A devise of real estate to A. for life, remainder to the children of A.

in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty-one years and without issue, and if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, a devise to the heirs and assigns of A., although A. had no child at the date of the will or at the death of the testator:—*Held*, that the gift to the heirs of A. was a contingent remainder.

A. was a married woman, and during her coverture she and her husband settled her interest under the will by a deed dated in 1840, and which was acknowledged pursuant to the Fines and Recoveries Act, upon herself for life, remainder to her children, and if none, then to her husband in fee. This deed recited the will accurately. A. died, never having had children:—*Held*, that her heir claiming by descent was not estopped by this deed.

The deed being expressed to be made in consideration of the husband building houses upon the land, which he afterwards finished:—*Held*, that it was a settlement for valuable consideration.

Held—That the Fines and Recoveries Act has not removed the inability of a married woman to contract concerning her real estate; and therefore *Held*—That the above-mentioned settlement, although for valuable consideration, was not a contract which could be enforced against the heir of the married woman.

The husband and wife afterwards mortgaged the property under a power in the settlement. S., the presumptive heir of the wife, being aware of the Plaintiff's intention to lend money upon such mortgage before he actually did so, told him that the husband was indebted to him S., and that he should expect to have his debt paid off out of the money which the Plaintiff was going to lend, and that he doubted whether the husband could mortgage the property; but S. did not state that he had any interest in the property, or that the husband and wife had not power to make the mortgage:—*Held*, that such knowledge of and acquiescence in the transaction of the mortgage did not create any equity against S. on his afterwards becoming the heir of A., all parties at the time of making the mortgage being in possession of all the facts of the case, and the mistake being a mistake not of fact but of law.

under the age of twenty-one years, and without leaving lawful issue of his, her, or their body or respective bodies living at the death of him or them respectively, and so often as such event may happen, the share or shares, as well accruing as original of every such child so dying, shall be and remain to the survivor or survivors, or other or others of the said children in equal shares or proportions, if more than one to take as tenants in common, and his, her, or their heirs and assigns respectively for ever, every share which shall so accrue to any such child being liable to the same condition of survivorship or accruer as his or her original share; and in case there shall not be any child of my said daughter *Eliza Chapman*, or if any and all such children shall die under the age of twenty-one years and without leaving lawful issue as aforesaid, then I do hereby give and devise the said two dwelling-houses with the appurtenants thereof unto the heirs and assigns of my said daughter *Eliza Chapman* for ever."

1855.
CROFTS
v.
MIDDLETON.
Statement.

And after certain other devises the will continued—

"And I give and devise unto my daughter *Sophia Middleton*, spinster, and her assigns during her natural life, for her sole and separate use, all those two dwelling-houses adjoining the *Coopers' Arms* in *Bartholomew-street* in *Newbury* aforesaid, now occupied by me and my tenant *Sarah Long*, with the yard behind the same and other the appurtenants thereof. And after the decease of my said daughter *Sophia Middleton*, I do hereby give and devise the said two dwelling-houses and premises with the appurtenants thereof unto an only child, or all and every the children of her my said daughter *Sophia Middleton*, lawfully to be begotten (if more than one) in equal shares or proportions as tenants in common, and not as joint tenants, and to the heirs and assigns of such child or children respectively for ever, with the like benefit and condition of

1855.
 CROFTS
 v.
 MIDDLETON.
 —
 Statement.

survivorship and accruer as is hereinbefore given or provided with respect to the children of my said daughter *Eliza Chapman*; and in case there shall not be any child of my said daughter *Sophia Middleton*, or if any and all such children shall die under the age of twenty-one years, and without leaving lawful issue as aforesaid, then I do hereby give and devise the said two dwelling-houses and premises with the appurtenants thereof unto the heirs and assigns of my said daughter *Sophia Middleton*, for ever."

The testator appointed his son *Samuel Middleton* executor of his will.

The testator died in 1838, leaving his eldest son *Samuel Middleton* his heir at law.

Before his death, his daughter *Sophia* had married *John Beale*.

Indentures of lease and release, dated respectively the 25th and 26th of May, 1840, were made and executed between and by *John Beale* and *Sophia* his wife of the one part, and *James Beale* of the other part, and were duly acknowledged by the said *Sophia Beale* in pursuance of the 3rd & 4th Will. 4, c. 74; and by such indenture of release, after partly reciting the said will of the said *Benjamin Middleton* and his death and the said marriage, and that the said *John Beale* and *Sophia* his wife had, with the consent of *Sarah Middleton*, widow of the said testator *Benjamin Middleton*, caused the said two dwelling-houses so devised by him to his said daughter *Sophia* as aforesaid to be pulled down, and in the room thereof had begun to erect a messuage or tenement, with offices and other buildings, and that the said *John Beale* and *Sophia* his wife were therefore desirous of settling and assuring the same and

ether the hereditaments and premises so devised to her the said *Sophia*, and adjoining and belonging thereto, to the uses thereafter mentioned: It was witnessed, that, for effectuating the intentions of the parties, and for the nominal consideration therein mentioned, the said *John Beale* and *Sophia* his wife granted and released unto the said *James Beale*, his heirs and assigns, the said site whereon the said two dwelling-houses formerly stood, with the appurtenants, to hold unto the said *James Beale*, his heirs and assigns, to the use of the said *Sarah Middleton* during her life, with remainder to the use of the said *Sophia Beale* for life, without impeachment of waste, with remainder to the use of the child and children of the said *Sophia Beale* in fee as therein mentioned; and if there should not be any child of the said *Sophia Beale*, and if any or all such children should die under the age of twenty-one years and without leaving issue, then to the use of the appointees of the said *John Beale* as therein mentioned; and in default thereof and subject thereto, to the use of the said *John Beale* for life without impeachment of waste, with remainder, to the use of the said *James Beale* and his heirs during the life of the said *John Beale* in trust for him, with remainder, to the use of the said *John Beale*, his heirs and assigns, for ever.

Subsequently *John Beale* completed the new houses which he was building on the land, and they were of much greater value than the houses previously standing thereon.

By an indenture of mortgage, dated the 23rd of April, 1842, and made between the said *Sarah Middleton*, widow, of the first part, the said *John Beale* and *Sophia Beale*, his wife, of the second part, and *Richard Harrison* of the third part, in consideration of 500*l.* paid to the said *John Beale*, with the privity of the said *Sophia* his wife and the said *Sarah Middleton*, by the said *Richard Harrison*, the

1855.
CROFTS
v.
MIDDLETON.
Statement.

1855.
 }
 CROFTS
 v.
 MIDDLETON.
 —
 Statement.

said *Sarah Middleton* and the said *John Beale* and *Sophia* his wife, according to their respective rights and interests in the premises, and in exercise and execution of every power vested in them or either of them, appointed, granted, and demised to the said *Richard Harrison*, his executors, administrators, and assigns, the said messuage or dwelling-house and buildings, for 1000 years, by way of mortgage, to secure the said sum of 500*l.* and interest.

Sarah Middleton died some time since, and thereupon the said *John Beale* and *Sophia* his wife entered into possession of the said hereditaments comprised in the said deeds.

Some time before the month of November, 1846, *Samuel Middleton*, the executor, borrowed of the Plaintiff *John Crofts* the sum of 300*l.*, and to secure the repayment thereof with interest signed and gave to the Plaintiff the following memorandum:—"Memorandum that I have this day received of Mr. *John Crofts* the sum of 300*l.* to enable me to pay off a mortgage to Mr. *Thomas Falkes* of *Reading* on my freehold property in *Bartholomew-street*; and I hereby undertake to deliver over the whole of the title-deeds and writings relative thereto to Mr. *Crofts*, and to make him such security for the repayment as he may require. Witness my hand this 7th May, 1844." And *Samuel Middleton* shortly afterwards delivered to the Plaintiff the title-deeds of the said freehold property in *Bartholomew-street*.

At the time when the said sum of 300*l.* was advanced by the Plaintiff to *Samuel Middleton*, *John Beale* was indebted to *Samuel Middleton* in the sum of 275*l.*, which *Beale* had borrowed to enable him to build upon the property.

By an indenture of assignment dated the 23rd of November, 1846, made between the said *Richard Harrison*,

st part, the said Defendant *John Beale* and *Sophia* of the second part, and the Plaintiff *John Crofts* third part, in consideration of 500*l.* to the said *Harrison* at the request of the said *John Beale* his wife, and of 500*l.* to the said *John Beale* his wife, paid by the Plaintiff, the said *Richard* assigned and transferred, and the said Defendant *Beale* and *Sophia* his wife appointed, granted, confirmed to the Plaintiff, his executors and assigns, the dwelling-house and buildings, with the appurtenants, the same for the residue of the said term of 1000 years subject to a proviso for re-assignment of the said term of the said sum of 1000*l.*, with interest for the same at the rate of 5*l.* per cent. per annum, at the time in the indenture mentioned, unto such person or persons as the said Defendant *John Beale* and *Sophia* his wife, or assigns, should direct or appoint.

1855.
CROFTS
v.
MIDDLETON.
—
Statement.

Beale died in March, 1847, without having had issue. *Samuel Middleton* was her heir at law.

Crofts filed the bill in this suit against *Samuel Middleton* and *John Beale* to foreclose his mortgage.

Middleton was examined as a witness on behalf of the Plaintiff, and his evidence was in effect, that in 1840, he had advanced 275*l.* to *John Beale* on his promissory note, to enable him to pay for the houses he had on his land; that in 1844, the Plaintiff *Crofts* lent to *Beale* 100*l.*, and, as a security therefor, witness deposited with the Plaintiff the title-deeds of some property of his situated in *Bartholomew-street*; that, in 1846, the said witness testified that he was about to advance to *John Beale* 100*l.* on security of *Beale's* property, and witness testified: "I said you are never going to do that; he owes me 455*l.* I said, if so, I should expect my

1855.
 CROFTS
 v.
 MIDDLETON.
 Statement.



deeds returned to me: I meant the deeds which the Plaintiff then had belonging to me as security for 300*l.* advanced to me by the Plaintiff on the 7th of March, 1844. I had mortgaged my property to advance money to *Beale*—namely, the 275*l.* and other money. I considered that if the Plaintiff was going to advance 1000*l.* on *Beale's* property, I ought to have my money returned from *Beale*, and my deeds back from the Plaintiff. If it was *Beale's* property and he could mortgage it—I was not aware that he could—I should expect the money I had advanced to *Beale* to be repaid out of it;” and that it was so arranged, and that witness got his deeds from the Plaintiff, and the 300*l.* was set off in account between them.

The witness further deposed, that, after seeing the Plaintiff, he called upon *Dibley*, the Plaintiff's solicitor, and asked him “if *Beale* was going to raise money from the Plaintiff, by mortgage of his property. He said, ‘Yes; Mrs. *Beale*, his wife, has given it to him. She could do it.’ I was not consulted about her giving it him. I know nothing more about it than *Dibley* told me. *Dibley* dismissed me. I had no further dealings with him on that subject. He said he had nothing to do with me in the matter.”

Argument.

Mr. *Rolt*, Q. C., and Mr. *E. F. Smith*, for the Plaintiff.

By the deed of 1840, the interest of *Sophia Beale* in the land under her father's will was well settled.

The construction of the will is, that it conferred an estate for life, with a vested remainder in fee, upon *Sophia*, subject only to be divested by a contingent executory devise in fee to her children, if she should have any, who should attain twenty-one, or die under that age leaving issue; for,

at the date of the will and the death of the testator, *Sophia Beale* had no children, and therefore the rule in *Shelley's case* applied to the limitation to her heirs, and it was not a contingent limitation (a); and this circumstance distinguishes this case from those in which limitations somewhat similar have been held to be contingent. As where the limitation is to *A.* for life, remainder in an event *not existing and uncertain* to *A.* in fee, or to the heirs of *A.*, with a limitation in another event not existing and uncertain to *B.* in fee; that is a contingency with a double aspect. [VICE-CHANCELLOR.—The point seems to be decided in *Plunket v. Holmes* (b).] No—the limitation in that case was to *A.* for life; and if *A.* should die without issue living at his death, remainder to *B.*; but if *A.* should have issue living at his death, to *A.*'s right heirs; and that was held to be a *contingent* remainder in *A.* upon the principle contended for, because the limitation to the heirs of *A.* was in an event *not existing and uncertain* at the date of the will. There is no decision expressly in point; the nearest is *Beck's case*, alias *Burton v. Nichols* (c); and there it was not decided, because the intermediate limitation was held to be an estate tail.

1855.
CROFTS
v.
MIDDLETON.
Argument.

But if the limitation to the heirs of *Sophia Beale* must be construed to be a contingent remainder, which could not at that time be the subject of a conveyance, still the deed of 1840 operated by estoppel, so as to bind the Defendant *Samuel Middleton* as the heir and privy in blood of *Sophia Beale*; so that he can never claim against that deed. So it is said in Co. Litt. 352. a.—“Touching estoppels, which is an excellent and curious kind learning, it is to be observed that there be three kinds of estoppels—viz, by matter of record, by matter in

(a) *Fearne's C. R.*, pp. 30, 31; (c) *Litt. Rep.* 159, 253, 285, 315, 344; *Cro. Car.* 363; *Fearne's Curtis v. Price*, 12 Ves. 89.

(b) 1 *Lev.* 11; *Raym.* 28; *C. R.* 352. *Fearne's C. R.* 341.

1855.
 CROFTS
 v.
 MIDDLETON.
 —
 Argument.

writing, and by matter in pais. By matter in writing as by deed indented, by making of an acquittance by deed indented or deed poll, by defeazance by deed indented or deed poll." In *Bensley v. Burdon* (a), it was so held. The same case afterwards seems to have come before Lord *Lyndhurst*, who, it is stated, affirmed the decision upon the ground that the release contained a recital that the releasor was entitled in fee: See *Right d. Jefferson v. Bucknell* (b), a case in which that view of Lord *Lyndhurst's* was followed; *Lloyd v. Lloyd* (c), and *Bowman v. Taylor* (d). But further, if a conveyance were made by fine by a person having no estate at the time, and the estate afterwards came to such person or his privies in blood, the acquisition of the estate would feed the estoppel, and make the fine which originally had only a tortious effect an operative conveyance: *Doe d. Christmas v. Oliver* (e). That was not the case with a lease and release, because that mode of assurance was an innocent conveyance. But a deed acknowledged under 3 & 4 Will. 4, c. 74, is substituted by that Act for a fine, and therefore a conveyance by such a deed by a person not having the estate intended to be conveyed would be fed by the subsequent acquisition of the estate by such person or his privies in blood, just as in the case of a fine: *Wood v. Lambirth* (f). Even if the deed of 1840 did not operate as an estoppel at law, it bound the conscience of *Sophia Beale* in equity, because she received a valuable consideration for her concurrence in it, by her husband building houses on the land; and therefore it is equally binding upon the conscience of her heir claiming under her as a volunteer. Thus in *Wright v. Wright* (g), where, upon a contingency, land was devised to R. in fee, and, before the contingency happened, by a deed, stating

(a) 2 S. & S. 519.

(b) 2 B. & Ad. 282.

(c) 4 Dru. & War. 369.

(d) 2 Ad. & E. 278.

(e) 10 B. & C. 187.

(f) 1 Ph. 8.

(g) 1 Ves. sen. 408.

his interest as though he had a vested remainder, *R.*, in consideration of natural love and affection, granted his right, title, claim, or demand under the will to his younger son, and died before the contingency happened, the conveyance, though only for a valuable consideration in the second degree, as the Vice-Chancellor observed, was supported against the heir at law of *R.* The smallest consideration will support such a deed against a volunteer: *Parker v. Carter* (a).

1855.
CROFTS
v.
MIDDLETON.
Argument.

But further, the Defendant *Samuel Middleton* stood by and allowed the Plaintiff to lend his money on this security, without mentioning or in any way alluding to any claim of his own to the estate. On the contrary, he actually stipulated for and received payment of a debt of his own out of the money so lent, and therefore in this Court he is bound by such acquiescence: *Pearson v. Morgan* (b), *Hobbs v. Norton* (c), *Raw v. Pote* (d), *Boyd v. Belton* (e), *Stronge v. Hawkes* (f), and *Gregg v. Wells* (g).

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

Upon the questions of equity which have been raised, I must hear the Defendants' counsel: I will dispose of the legal points at once. The first suggestion was, that, there being a legal limitation to a lady, who had no child at the date of the will, for life, with a contingent remainder to her children, if they should attain twenty-one, in fee simple, followed by a limitation to her heirs in the event of her having no children who should attain twenty-one, this last limitation, though plainly contingent, ought to be read thus:

- (a) 4 Hare, 409.
- (b) 2 B. C. C. 387.
- (c) 1 Vern. 135.
- (d) 2 Vern. 239.

- (e) 1 J. & L. 730.
- (f) 4 De G., Mac., & G. 186.
- (g) 10 Ad. & E. 90.

1855.
 CROFTS
 v.
 MIDDLETON.
 Judgment.

—*rebus sic stantibus*, if she should still have no child at the death of the testator, she is to take an estate in fee; and, as if the only contingency was one divesting the fee so conferred, and vesting it in her children if she should have any who should attain twenty-one. The fallacy of this argument is, that the limitation is not in fee except on a contingency, which cannot be ascertained until the death of the lady, namely, whether she shall then have children who shall attain twenty-one, and, if not, she is to have the fee. The rule in *Shelley's case* does not interfere with this construction, it only determines when the word heir is to be read as a word of limitation or purchase.

The limitation then is of an estate for life, with a contingent remainder in fee; and, it is clear, that, except by the doctrine of estoppel, that contingent remainder could not have been conveyed at law.

But, it is argued, that there was an estoppel in this case, and on that part of the argument I think that the distinction which was attempted to be made is utterly untenable. It was suggested that the mere effect of a lease and release works an estoppel, and for this *Coke* upon *Littleton* was cited, where he lays down that there may be an estoppel by deed indented against the party conveying, and against his privies in blood. But, the question always is, whether there is, upon the whole deed, any distinct averment either by recital or in any other way,—as I shall notice when I come to speak of estoppel by demise,—any distinct averment of the grantor's title against which his heir or his privy in blood can assert nothing, being bound by the deed. Release is not such an averment. Lord *Lyndhurst*, on the appeal in *Bensley v. Burdon* (a), founded his judgment entirely on the express averment in the deed by the party

(a) 2 E. & Ad. 282.

making it, that he was seised in fee, which his heir was not allowed to dispute; he did not rely upon the conveyance made by the deed. There is a passage in *Litt*, sect. 446, which shews why a demise operates as an estoppel. *Littleton* lays it down, that "no right passeth by a release but the right which the releasor had at the time of the release made; for, if there be father and son, and the father be disseised, and the son (living his father) releaseth by his deed to the disseisor all the right which he hath or may have in the same tenements, without clause of warranty &c., and after the father dieth &c., the son may lawfully enter upon the possession of the disseisor."

1855.
Crofts
v.
Middleton.
Judgment.

There is no estoppel, then, if there is no warranty—but all demises imply an assertion of title, and give this kind of warranty; whilst a conveyance by lease and release has simply this operation: the estate passes by the lease for a year, and then by a release founded on that the lessee takes all the estate and interest which is then in the releasor; it is an innocent conveyance which only passes what he then had, and, therefore, by the release alone there can be no estoppel. But here there is besides a distinct recital of the true title. The deed of 1840 recites the will of the testator, and purports to release all the estate and interest of the party derived under it; and I find a passage in a judgment of Lord *Tenterden*, in the case of *Right d. Jefferys v. Bucknell* (a), which I am glad to avail myself of, instead of using my own words, "Nor shall a man be estopped where the truth appears by the same instrument, or that the grantor had nothing to grant, or only a possibility." In this case the instrument shewed upon the face of it, that the party had not anything to release except this contingent interest, and, therefore, the deed could have no legal effect. The Statute of Fines and Recoveries does not give to this deed the effect of a fine, but only the operation which it would

(a) 2 B. & Ad. 281.

1855.
 CROFTS
 v.
 MIDDLETON.
 Judgment.

have if executed by a man or feme sole; and, there any person so circumstanced would not be estoppe can be no estoppel in this case.

Argument.

Mr. W. M. James, Q. C., and Mr. Bevir, for t
 fendants, upon the questions of equity,

The deed of 1840 cannot be regarded as a contrac
 this Court will enforce. A wife is not capable of c
 ing with her husband. The 3 & 4 Will. 4, c. 74, i
 in any way removed this disability. If she had
 into a formal agreement by an acknowledged de
 valuable consideration, that contract could never be e
 against her or her heirs.

As to the alleged acquiescence of the Defendan
dleton, there could be none in such a case as this, w
 mistake was in law and all the facts were known to b
 ties, to the Plaintiff as well as to the Defendant, :
 Plaintiff was even put upon his guard by the De
Middleton himself. To obtain relief on this groun
 of fraud or bad faith must be made out: *Dann v.*
rier (a), *Pilling v. Armitage* (b), *Master of Clare*
Harding (c).

Mr. E. F. Smith, in reply, relied on *Parker v. Can*
 as shewing that a married woman can contract by
 knowledged deed.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

A married woman by a deed of conveyance duly a
 ledged by her under the Statute for the Abolition c

(a) 7 Ves. 231.

(b) 12 Ves. 85.

(c) 6 Hare, 273.

(d) 4 Hare, 409.

said company were charged with and rendered subject and liable to the payment, to the executors, administrators, or assigns of the said borrower, of 400*l.* within three months after satisfactory proof of his decease, subject to the payment of the premium and to the provisoes and conditions in the said policy expressed; and that the said borrower had agreed with the said parties thereto of the third part for the loan of 210*l.* on the security of an assignment of the said policy, and on the security of the joint and several covenants therein contained: it was witnessed, that, in consideration of the sum of 210*l.* to the said borrower paid by the said parties thereto of the third part immediately before the execution thereof, the said borrower assigned the policy to the said parties thereto of the third part, subject nevertheless to a proviso avoiding the indenture in case the said borrower, his heirs, executors, or administrators should pay unto the said parties thereto of the third part, their executors, administrators, or assigns the said principal sum of 210*l.* by equal half yearly instalments of 70*l.* each on each succeeding 22nd day of August and 22nd day of February, until the whole of the said principal sum should be paid, together with interest at 5*l.* per cent. per annum on so much of the said principal sum as should from time to time remain unpaid, the first of such instalments to be paid on the 22nd day of August then next (the covenants thereafter contained being fully performed). And the said borrower and the said parties thereto of the second part, for themselves, their heirs, executors, and administrators, thereby *jointly and severally* covenanted with the said parties thereto of the third part, their executors, administrators, and assigns, that they the said parties thereto of the first and second parts, *or some or one of them*, their or or some or one of their executors or administrators would pay to the said parties thereto of the third part, their executors, administrators, or assigns, the said instalments and interest on the several days and times aforesaid, and that if

1855.

EVANS

v.

BREMIDGE.

Statement.

1855.
EVANS
v.
BREMIDGE.
—
Statement.

default should be made in payment of any or either of the said instalments and interest, or any part thereof as aforesaid, then that they the said parties thereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators would pay to the said parties thereto of the third part, their executors, administrators, or assigns, upon request, the whole of the said principal sum and interest, or so much thereof as should remain unpaid; and that they the said parties thereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators would from time to time during the life of the said borrower, until all moneys purported to be secured by the said indenture should be fully paid and satisfied, pay the premiums, duty, and expenses which ought to be paid for keeping the said policy on foot, and for effecting and keeping on foot every renewed and substituted policy. And that in case default should be made in payment of any such annual premiums, duty, or expenses, it should be lawful for the parties thereto of the third part, their executors, administrators, and assigns from time to time, so long as any money should remain secured by the said intended indenture, to keep on foot such assurance as aforesaid, and in case of the forfeiture or determination of the said policy, to renew the said policy or effect a substituted policy with the said company for the like amount upon the life of the said borrower, and to pay or retain the premiums and other expenses thereon; and that the said parties thereto of the first and second parts, or some or one of them, their or some or one of their executors or administrators would upon request pay unto the said parties thereto of the third part, their executors, administrators, or assigns all such money as they or he should expend in or about, or be reasonably entitled to receive or retain for or in respect of keeping on foot such assurance as aforesaid, and for and in respect of renewing the said policy or effecting any such substituted policy as afore-

said, with interest thereon at the rate of 5*l*. for every 100*l*. by the year; and that the said policy and every such renewed and substituted policy should be a security for the repayment of the same sums and interest in addition to the said sum of money intended to be thereby secured as afore-said, and the interest thereof, and the costs, charges, and expenses occasioned by the nonpayment thereof, but so nevertheless that the total amount of principal money to be ultimately recoverable under the said indenture should not exceed the sum of 300*l*.

1855.
 EVANS
 v.
 BREMERIDGE.
 Statement.

Elton executed this deed on the day of its date, and then took it to the Plaintiff at *Worcester*, where the Plaintiff executed it and returned it to *Elton*. And the *Anchor Assurance Company* afterwards advanced to *Elton* the sum of 210*l*. less certain deductions.

The other surety *William Bradley* never executed the deed.

On the 28th of March, 1849, *John Robert Dalby*, the then manager of the said company, sent to the Plaintiff the following letter :—

“ *Anchor Life Assurance Company*,

“ 30, *Sackville-street, Piccadilly*,

“ *London*, March 28th, 1849.

“ SIR,—The directors expect undeviating punctuality in the return of all moneys advanced by this company, as by the contract of assurance nothing will become payable to the assured in case of death unless the premiums of insurance, as well as the instalments and interest on any loan made to them by the office, be regularly paid. I therefore beg to forward for your particular guidance the subjoined list of instalments as they severally become due upon the Reverend *George Elton's* loan of 210*l*., which sums must

1855.
 EVANS
 v.
 BREMRIDGE.
 —
 Statement.

be paid on the day they respectively fall due, otherwise *immediate application will be made to the sureties*, and the policy of assurance will at the same time become void.

"I am, Sir, your obedient servant,

"JOHN ROBERT DALBY, Manager."

When Payable.	Instalments.	Interest.	Premiums.	Total.
	£	£ s. d.	£ s. d.	£ s. d.
22nd of August, 1849	70	5 5 0	19 14 8	75 5 0
" February, 1850	70	3 10 0		93 14 8
" August, "	70	1 15 0		71 15 0

George Elton did not pay the instalment which became due on the 22nd of August, 1849; and *Mr. Dalby* on the 11th of September, 1849, sent to the Plaintiff another letter as follows:—

"September 11th, 1849.

"SIR,—The Reverend *G. Elton* having failed to pay up the arrears due on the loan advanced to him by this office, I am directed by the Board to apply to you *as one of his sureties* for the immediate payment of the same, in order to prevent instructions being given to our solicitor to recover the entire amount remaining due to the company.

"I am, Sir, your most obedient servant,

"JOHN R. DALBY, Manager."

And on the 18th of the same month, a clerk of *Mr. Cleoburey*, who was the solicitor of the company, sent to the Plaintiff the following letter:—

"18th September, 1849.

"SIR,—The Reverend *Mr. Elton* having failed to pay up his instalment due from him to the *Anchor Assurance Company*, my instructions are to issue writs against *the*

sureties, unless the amount due be paid at my office as above before Saturday next, with 5s. for this application.

"I am, Sir, your obedient servant,

"For Mr. *Cleoburey*, "G. W. PRESCOTT."

1855.
EVANS
v.
BREMIDGE.
Statement.

"N. B.—This business having been placed in my hands, it will be useless to make any application to the office."

In reply to such applications, the Plaintiff, who was then the solicitor of *George Elton*, acting upon his representations, applied for delay until the then following Christmas, to which request the said company acceded.

At the following Christmas the property of the said *George Elton* was sold, and did not produce sufficient to enable him to make any payment to the said company.

On the 19th of January, 1850, the Plaintiff called at the office of the company to inquire the address of *William Bradley*, and then ascertained for the first time that *William Bradley* had never executed the said indenture, and that the company had advanced the said sum of 210*l.* less some deductions, to the said *George Elton*, and he had delivered over to them the said indenture executed by himself and the Plaintiff only, alleging that he was very anxious to go out of *London* on that day, and stating that the said *William Bradley* would call and execute the said indenture on the then following day, which however he did not do.

In consequence of such discovery, the Plaintiff insisted that he was not liable upon the indenture, or at all events, not liable for more than one moiety of the moneys due thereunder.

The company however, on the 28th of May, 1855, caused an action to be commenced against the Plaintiff in the

1855.
 EVANS
 v.
 BREMRIDGE.
 ———
Statement.

names of the Defendants *Bremridge, Wertheimer, and Wilson*, to recover the sum of 210*l.* with interest thereon from the 22nd of August, 1849, and a premium of 19*l.* 14*s.* 8*d.*, which became payable on the policy on the 22nd of February, 1850. The Plaintiff *Evans*, the Defendant at law, pursuant to the Statute 17 & 18 Vict. c. 125, s. 83, pleaded by way of equitable plea the facts and circumstances above mentioned, to which the Plaintiff at law demurred. The action at law was still pending, and the demurrer was set down for argument.

The Plaintiff now filed the bill in this suit, alleging that he had executed the said indenture on the faith that *William Bradley* would afterwards execute it as his co-surety, and praying a declaration that the Plaintiff was in equity discharged from all liability under the said indenture, and that such indenture might be decreed to be cancelled so far as the Plaintiff was concerned, or that, at all events, it might be declared that the Plaintiff was not liable in equity for more than one moiety of the moneys due thereunder, which he was ready and offered to pay if necessary; and for an injunction to restrain the Defendants from further prosecuting their action against the Plaintiff as aforesaid, and from commencing any other action against the Plaintiff upon the said indenture.

Argument.
 ———

Mr. *Rolt*, Q. C., and Mr. *Southgate* for the Plaintiff.

The Plaintiff is discharged from all liability, because he executed the deed upon the faith that his liability was to be joint and several; and the Defendants ought to have procured the deed to be executed by the other surety, which they did not do, nor did they inform the Plaintiff that this was not done, but, on the contrary, wrote to him afterwards as one of the sureties: *Underhill v. Horwood* (a),

(a) 10 Ves. 226; 14 Ves. 28.

Bonser v. Cox (a), *Leaf v. Gibbs* (b), *Pidcock v. Bishop* (c),
Whitcher v. Hall (d), *Stone v. Compton* (e).

1855.
EVANS
v.
BREMIDGE.
—
Argument.

Mr. Chandless, Q. C., am. cur., mentioned *Rice v. Gordon* (f), where a person having signed as surety for a firm a joint and several bill of exchange, on the faith that another person would sign it as co-surety with him, such other person not having signed he was held to be discharged from liability as between himself and the firm.

Mr. Shapter for the Defendants.

The Plaintiff ought not to have come to a Court of equity at all. A Court of law could give him relief against his liability under this deed, if he is entitled to any, by making him pay part of the amount only: *Wodehouse v. Farebrother* (g). And having pleaded an equitable defence at law, the whole jurisdiction over the case was at law: *Frank v. Barnett* (h). [VICE-CHANCELLOR.—That does not oust the jurisdiction of this Court (i). It only affects the question of costs.]

This instrument, it is admitted, is binding to some extent at law. The Defendants only seek to make the Plaintiff liable for half the amount secured. This Court cannot grant the Plaintiff relief to any greater extent. *Ex parte Giffard* (k), *Latch v. Wedlake* (l).

There is no question of contract in the case. The rights of a principal and sureties depend upon the equities between

(a) 4 Beav. 379; 8 Jur. 387.

(b) 4 Car. & P. 466.

(c) 3 B. & C. 605.

(d) 5 B. & C. 269.

(e) 1 Arnold, 436.

(f) 11 Beav. 265.

(g) 19 Jur. 998.

(h) 2 Myl. & K. 620.

(i) Note.—See *Farebrother v. Welchman*, 24 L. J., N.S., Ch. 410.

(k) 6 Ves. 805.

(l) 11 Ad. & E. 959.

1855.
 EVANS
 v.
 BREMRIDGE.
 Argument.

the parties. In *Austin v. Howard* (a) a plea by one of two sureties to a replevin bond, that it was not executed by the other surety, was held to be bad, and the Court recommended the Plaintiff to take half, and that is the equity of the case. It is true that a doubt was thrown out whether the surety might not have succeeded if he had pleaded that he executed the bond only as an escrow until it was executed by the other surety. But there is no foundation for that: *In re Simple* (b).

Mr. Rolt, Q. C., in reply.

The VICE-CHANCELLOR reserved his judgment.

Dec. 11th. VICE-CHANCELLOR SIR W. PAGE WOOD:—
 Judgment.

The only question in this case is, how far the Plaintiff in equity is entitled to be relieved from the consequences of a covenant entered into by him in a deed purporting to be made between him and the *Anchor* Insurance Company, a third person who had borrowed money from the company, and another party whose name was introduced into the draft deed as a co-surety with the Plaintiff for the borrower.

From the form of the deed, which was prepared by the Insurance Company and sent by them to the Plaintiff, it is beyond question that the original intention of all parties was that the Plaintiff and *William Bradley* should be co-sureties for *Elton*, the borrower of the money, and that they should be jointly and severally bound. *Elton* and the Plaintiff alone executed the deed, and the company took possession of it so executed, and did not procure it to be executed by the other surety. The Plaintiff was left in ignorance of that fact, and recently letters have been written to him on behalf of the company, in which they call upon him to pay as one of the sureties.

(a) 7 Taunt. 28, 327.

(b) 3 J. & L. 488.

neced that under these circumstances it was to hold the Plaintiff liable for the whole sum of the deed. His present claim is to be relieved in the payment even of half the amount.

1855.
 EVANS
 v.
 BREMIDGE.
 Judgment.

I my judgment because I wished to consider the particularly *Ex parte Giffard (a)*, in which appears to have entertained an opinion, though positively determine the point, that after such a been executed the person taking it might release the sureties without discharging the co-surety liability. It seemed to me, if that was the law, might be given to one of two sureties the money had executed the deed of suretyship, without the other, that a surety could scarcely say he in any worse position where his intended co-surety executed the deed at all. I do not think however in cases are precisely similar, because the surety rests on the probability or improbability of a deed being given, and may be willing to take the risk of the creditor diminishing his security by afterwards releasing one of his sureties. But in *Nicholson v. Ex parte Giffard* was cited, and Lord Eldon's decision expressly overruled by the Court of Queen's Bench. The learned Judges in that case said that it appeared that Lord Eldon had not decided the point, and had not had all the circumstances before him; and on the authority of the case in the Year Books, 1 B. pl. 33, they held distinctly that a release of the obligor is a release of both, and that therefore the decision in *Ex parte Giffard* could not be upheld; but if the creditor did release one of two sureties, the other was not discharged. That decision at law has not been disputed.

1855.
 EVANS
 v.
 BREMIDGE.
 —
 Judgment.

It was argued for the Defendants that the deed in this case cannot be treated as founded upon an agreement that all parties should execute it; and in support of this argument the case of *In re Semple* (a) was cited, to shew that in the case of a creditor's deed one party could not say, I executed this deed on the faith that other creditors would also execute it, and as they have not done so, I am not to be bound. The real point there was, that it was contended the deed had not been delivered, but was an escrow, and was only to take effect upon condition; but it was held that at law it was a good deed; and under the particular circumstances of the case Lord *St. Leonards* was of opinion that there was no equity to alter the legal effect of the deed.

So here the deed is good at law. Not having delivered the deed upon condition of its being executed by the co-surety, the Plaintiff is bound at law to pay the whole amount; but the question is what is its effect in equity.

I apprehend, it being conceded (omitting all question as to the operation of the deed as an escrow) that the Plaintiff cannot be held bound to pay the whole amount of the debt, it follows that the legal operation of the deed must be controlled, and the question is, to what extent that must be done? In *Underhill v. Horwood* (b) Lord *Eldon* says distinctly, that the relief granted by Courts of equity in such cases is to decree that the deed should be delivered up. He there says, "I had a notion which I think was not correct, that where a man executes a bond, meaning that it should be the joint bond of himself and another, and not his several bond, it would not be his several bond. But the cases go farther. In such a case, however, unless there is something special, the man who had become so

(a) 3 J. & L. 488.

(b) 10 Ves. 225.

severally bound has a right to have that bond delivered up, for his intention was not to become a mere several obligee, and the rights are different both in law and equity."

1855.
EVANS
v.
BREMBRIDGE.
Judgment.

The only doubt I had was whether it might not be the proper course to order the deed to be delivered up upon some terms, as that the Plaintiff should be bound to the extent of half the sum secured by his covenant; but looking to the other authorities, *Leaf v. Gibbs (a)* and *Rice v. Gordon (b)*, which proceeded upon the equities of the parties, it seems to be decided that when once it appears that the instrument is not such as it was intended to be, this Court holds that the legal effect of the instrument is to be got rid of as against the surety. This Court, then, will look at the original agreement between the parties, to see if it appears that they all intended the obligation should be joint and several between the co-sureties. In this case the deed was in that form, and was prepared and framed by the covenantees, who sent it for execution to the Plaintiff, thereby giving him the clearest intimation that his liability was intended to be joint and several. After that, it was the duty of the company to inform the Plaintiff that the deed was not executed by his co-surety as originally proposed, and to ascertain his view with respect to his altered position. It is impossible to say that it was not materially altered by the Plaintiff becoming severally bound, especially in this case, considering the relation of the principal debtor to the other surety. The Plaintiff may have calculated on the influence that person might have exercised together with himself in inducing the debtor to discharge his obligation.

I am of opinion, on the whole, that the Plaintiff is entitled to have this deed wholly set aside, and, as he was not informed of his altered position, with costs.

(a) 4 Car. & P. 466.

(b) 11 Beav. 265.

1855.
 EVANS
 v.
 BREMIDGE.
 Minute.

DECLARE that the Plaintiff is discharged from all liability, and that the deed ought to be delivered up to be cancelled, and that the Defendants must pay the costs of this suit.

NOTE.—This decision was affirmed by the Lords Justices, February 23rd, 1856.

Dec. 14th &
 15th.

ATCHERLEY v. DU MOULIN.

Marriage Settlement—Covenant to settle Property of Wife—"Be or become entitled"—Will—Construction—Contingent Legacy.

By an antenuptial settlement, the intended husband and wife covenanted with the trustees, that if the intended husband and wife, or either of them in her right, should at any time during the coverture "be or become entitled" to any personal property of the value of 100*l.*, or upwards, the same should be settled. At the

time of executing the settlement, the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death, who should attain twenty-one or marry, in equal shares. The marriage was solemnised, and the wife's father survived her husband:—*Held*, first, that the interest of the wife in the legacy during the coverture was contingent; and,

Secondly, that it was not within the covenant in the settlement.

LADY MANNOCK, by her will dated the 7th of February, 1814, directed that the sum of 2500*l.* £5 per cent Bank Annuities should, within the space of six calendar months after her death, be purchased or transferred out of her personal estate, and invested in the names of her trustees *Selby* and *Wright*, who should stand possessed thereof, upon trust for all and every the daughter and daughters of *Andrew Du Moulin* living at the time of his decease who should attain the age of twenty-one years or marry, to be divided amongst them in equal shares; and if there should be but one such daughter, the whole to be in trust for such one daughter; and after certain other bequests, the testatrix gave and bequeathed all the residue of her personal estate to the said *Selby* and *Wright*, their executors, administrators, and assigns, upon trust to convert and invest the same as therein mentioned, and to stand possessed thereof upon the same trusts in favour of the daughters of the said *Andrew Du Moulin* as were thereinbefore expressed concerning the said sum of 2500*l.* £5 per cent Bank Annuities, with a gift over, in case there should be

no daughter of the said *Andrew Du Moulin* living at his death who should attain twenty-one or marry.

1855.
 ATCHERLEY
 v.
 DU MOULIN.
 —
Statement.

The testatrix died on the 17th of April, 1814; *Andrew Du Moulin* died on the 4th of July, 1854, having had issue six children, two of whom died in his lifetime; four survived him—namely, a son and three daughters—of whom the Plaintiff, *Anne Atcherley*, was one. The four surviving children severally attained their ages of twenty-one in the lifetime of the said *Andrew Du Moulin*, and the Plaintiff and another of the said daughters were married in his lifetime.

The Plaintiff was married to *Rowland Atcherley* in the year 1846; and previously to and in contemplation of such marriage, an indenture of settlement, dated the 12th of January, 1846, was made and executed between and by *Eliza Atcherley* of the first part, the said *Rowland Atcherley* of the second part, the Plaintiff, by her then name of *Anne Du Moulin*, spinster, of the third part, and the Defendants *Nicholas Selby Du Moulin* and *Edward Norris* of the fourth part; and by this indenture, after reciting amongst other things that it had been agreed that the said *Rowland Atcherley* and *Anne Du Moulin* should covenant with the said *Nicholas Selby Du Moulin* and *Edward Norris*, their executors and administrators, to settle and assure all such personal estate as the said *Anne Du Moulin*, or the said *Rowland Atcherley* in her right should be or become entitled to as thereafter mentioned, in the manner thereafter expressed, and after settling a sum of 1250*l.* and certain other property, it was witnessed that the said *Rowland Atcherley* and the said *Anne Du Moulin* for himself and herself, and his and her heirs, executors, and administrators, did thereby covenant with the said *N. Selby Du Moulin* and *Edward Norris*, their executors and administrators, that in case the said intended marriage should

1855.
 ATCHERLEY
 v.
 DU MOULIN.
 —
Statement.

take effect, and they the said *R. Atcherley* and *Anne Du Moulin*, or either of them in her right, *should at any time or times during the said intended coverture be or become entitled* by gift, devise, bequest, descent, or otherwise howsoever, to any personal estate of the value or amount of 100*l.* or upwards, at any one time (other than and except interests which should be restricted to the life of the Plaintiff or which, whether so restricted or not, should be settled and limited to her separate use and disposal) then and in every such case the same should be forthwith vested in the said *Nicholas Selby Du Moulin* and *Edward Norris*, or other the trustees or trustee for the time being of the said indenture of settlement, upon trust to convert and get in the same, and to stand possessed of the money to arise from such personal estate, upon trust to invest the same in the public stocks or funds of the United Kingdom, or at interest upon real securities, and to stand possessed of the said stocks, funds, and securities, upon trust to pay the interest, dividends, and annual produce thereof to such person or persons, and for such intents and purposes as the said *Anne Du Moulin*, notwithstanding her being under coverture, should by any writing under her hand from time to time, when and as the same should become due and payable, but not by way of anticipation, direct or appoint; and in default of and subject to any such direction and appointment, in trust to pay the said interest, dividends, or annual produce as and when the same should become due, but not by way of anticipation, into the proper hands of the said *Anne Du Moulin*, for her separate use, and upon her single receipt for the same; and after her death, upon trust to pay such interest, dividends, or annual produce to the said *R. Atcherley* during his life, subject to a proviso determining such life interest in certain events in the said indenture mentioned; and after the decease of the survivor of them the said *Rowland Atcherley* and *Anne Du Moulin* upon the like trusts, and subject to the like powers and provi

sions, for the benefit of the children and remoter issue of the said *Rowland Atcherley* by the said *Anne Du Moulin* as were thereinbefore expressed or declared for the benefit of such children and issue in respect of the sum of 1250*l.* thereinbefore covenanted to be paid, and subject to such trusts, powers, and provisions, then in case the said *Anne Du Moulin* should survive the said *Rowland Atcherley*, upon trust for the said *Anne Du Moulin*, her executors, administrators, or assigns; but in case the said *Rowland Atcherley* should survive the said *Anne Du Moulin*, then upon trust as in the said indenture is mentioned.

1855.
 ATCHERLEY
 v.
 DU MOULIN.
 Statement.

Rowland Atcherley died on the 10th of March, 1851, leaving the said *Anne Atcherley* his widow, and three children surviving him. *Nicholas Selby Du Moulin* and *Edward Norris* received *Anne Atcherley's* share of the 2500*l.* and the residue under *Lady Mannock's* will, and invested the same in the purchase of 1955*l.* 15*s.* 9*d.* Bank £3 per cent. Annuities. *Anne Atcherley* as Plaintiff, and the trustees of her settlement and her children as Defendants, submitted these facts in a special case to the Court, the question being whether the said sum of 1955*l.* 15*s.* 9*d.* Bank £3 per cent. Annuities was subject to the settlement, or belonged absolutely to the Plaintiff.

Mr. *Fooks* for the Plaintiff.

Argument.

Mr. *Bates*, for some of the Defendants, cited *Grafftey v. Humpage* (a), in which it was decided that a reversionary interest in certain personalty, which was vested in the wife at the time of the marriage, was included in a covenant to settle any property to which she should thereafter during the coverture become entitled.

(a) 1 Beav. 46.

1855.

ATCHERLEY

v.

DU MOULIN.

Argument.

Mr. Rolt, Q. C., and Mr. Fleming, for the trustees.

The interests given to Mrs. *Atcherley* by Lady *Mannock's* will were vested, subject to be divested. As in *Harrison v. Foreman* (a), where the bequest was to *A.* for life, and after her death to *B.* and *C.* in equal moieties; and in case of the death of either of them in the lifetime of *A.*, the whole to the survivor living at *A.'s* death; and *Smither v. Willock* (b), where the gift was to the testator's wife for life, and after her death to his brothers and sisters named in the will in equal shares; and in case of the death of any of them in the lifetime of the wife gift over; and *Sturgess v. Pearson* (c), where the gift was to *A.* for life, and after her death to be equally divided amongst her three children or such of them as should be living at her decease, the same to be paid to them at their age of twenty-one years. [VICE-CHANCELLOR.—Is there any gift here to any of the children of *Andrew Du Moulin* until his death? It is only to be divided among those who shall be living at his death.] At any rate, if it was a contingent interest, it might be bound by the settlement. [Mr. *Lee*, Q. C., am. cur., referred to *Ivison v. Gassiot* (d).] And the covenant being to include all property which the intended wife should "be or become entitled to," did not refer only to future property, and therefore this interest is within the terms of the covenant.

Mr. *Fooks*, in reply, referred to *Bull v. Pritchard* (e).

Dec. 15th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether or not a contingent interest, which the Plaintiff Mrs. *Atcherley* took under a

(a) 5 Ves. 207.

(b) 9 Ves. 233.

(c) 4 Madd. 411.

(d) 3 De G., Mac., & G. 958.

(e) 1 Russ. 213.

and Recoveries can pass all her interest in her real estate, either legal or equitable. That is the effect of the interpretation clause, which says, that the word "estate" shall include every interest in land, either at law or in equity, and there are also provisions enabling her to release powers. It is a different question whether she can enter into a contract with her husband, or with any other person, which could be enforced by this Court against the wife during her life, or her heirs after her death. It has been argued, that she must be in some sense capable of contracting, or else the question in *Parker v. Carter* (a) could not have arisen. In that case an estate was limited to the use of the husband and wife, and the heirs and assigns of the wife, and there was subsequently a conveyance by the husband and wife by deed and fine, which, but for the stat. 27 Eliz. c. 4, was a perfect conveyance; and the question was, whether there was any consideration for the deed: and it was held that the concurrence of the husband and wife was a sufficient consideration. The question of contract would arise in such a case in a modified sense. The Court would inquire whether there was any consideration passing to the person who made the conveyance, and in that sense it would consider the question of contract, that is to say, that the married woman in return for the consideration so paid to her disposed of all her estate and interest. That is different, however, from the question whether she could enter into any contract which could be enforced against her.

Mr. Smith.—There are some authorities on that subject, which I submit establish that a married woman has power to enter into a binding contract respecting her real estate.

VICE-CHANCELLOR.—If you have any such cases they may be handed up to me, and I will consider them hereafter (b).

(a) 4 Hare, 409.

(b) *Mr. E. F. Smith* subsequently handed up the cases of *Owens v. Dickenson*, Cr. & Ph.

1855.
 CROFTS
 v.
 MIDDLETON.
 —
Judgment.

I confess, from the opening of this case, my impression has been that relief could not be given, unless it might upon the principle of *Wright v. Wright* (a). There were no means of conveying this contingent interest at law; but it was argued, that if there were any valuable consideration, this Court would enforce the deed in equity. Subject to any authority that I may be referred to on that point, I am of opinion that this Court would not enforce specific performance of a contract by a married woman, by deed acknowledged by her, that on a particular day for a certain consideration she would execute a proper conveyance of her lands. Unless the case is brought to that, the Plaintiff could not obtain the relief which was given in *Wright v. Wright*, and which he might otherwise be entitled to. If I had to consider, whether there is a valuable consideration expressed in the deed, then, since the husband was under no obligation to build upon his wife's lands, I think his having done so would be sufficient to establish a consideration for the contract.

Then, with respect to the supposed fraud, the Defendant has been examined as a witness, and his statement amounts to this: the Plaintiff told him he was going to advance money to *Beale*, and the Defendant thereupon informed him that *Beale* owed the Defendant money, and said that he must be paid that sum, and that he should insist on the Plaintiff giving up to him the title-deeds, which he had deposited with the Plaintiff to secure 300*l.* due from the Defendant to the Plaintiff; and at the same time the Defendant intimated that *Beale* had got the property, or used some equivalent words. He afterwards met the Plain-

48; *Stead v. Nelson*, 2 Beav. 245; and *Dowell v. Dew*, 1 Y. & C. C. 345; and the Vice-Chancellor in the course of the week intimated that these authorities did not in-

duce him to alter his opinion, because in all of them the wife had an estate to her separate use.

(a) 1 Ves. sen. 408.

tiff's solicitor, who told the Defendant that *Beale's* wife could give the Plaintiff the property, and that he did not want the Defendant's assistance. Instead of any statement having been made to mislead the Plaintiff, he there set the Defendant at defiance, saying that he did not require his help, because the property could be conveyed by the wife and husband together. If the Plaintiff knew that the Defendant *Middleton* was the heir of his father, he would not have any reason to complain. After having been told that there were doubts as to *Beale's* power to convey the land he chooses to complete the transaction without the assistance of the other party. If he did not know his own rights, can he say that the Defendant, as heir, was concurring in the arrangement? In either case, this is very different from the authorities which have been cited. In every one of those there has either been silence as to some fact which was known to one of the parties, and not to the other, at a time when the former knew that the other party was about to act upon the supposition that no such fact existed; or, as in another class of cases, where a person makes a direct misrepresentation concerning the state of the title. The fraud in that class of cases, which consists in the tacit suppression of a fact, may be a fraud in the eye of the law without being morally a fraud. The person may have knowledge of the fact without knowing its legal effect; the law supposes that he must be aware of its legal effect, and therefore he is bound. So, in a case of positive misrepresentation, a man may represent that he has no interest, because, from a mistake as to the law, he believes that he has none; still, if he makes that representation, he is assumed to know the law, and is therefore bound by his representation. The only case cited in which the decision was adverse to the party who had made a suggestion which might have led the other party to a true knowledge of the state of the case, was

1855.
CROFTS
v.
MIDDLETON.
Judgment.

1855.
 CROFTS
 v.
 MIDDLETON.
 Judgment.

Hobbs v. Norton (a), in which Sir *George Norton* said to the intended purchaser from his brother of an annuity, that he believed his brother had a good title to it; he had been paying him the annuity for twenty years; that he had heard there was an old settlement, but he had been paying this annuity for twenty years. But he must be taken by that representation to have meant that the old settlement was not material, and this threw the other party off his guard; and the person who made that representation was not allowed subsequently to set up the old settlement against the person whom he had so misled. That was the strongest case cited; but that case falls far short of this.

I dismiss the bill, but I think it must be without costs, as a house has been built upon the property, and 300*l.* have been paid to the Defendant in respect of this mortgage transaction.

Mr. *James*, Q. C.—With respect to costs, there is an action at law pending, which we have suspended on account of this suit.

VICE-CHANCELLOR.—If the Plaintiff gives you judgment in the action I dismiss the bill without costs; otherwise, with costs.

(a) 1 Vern. 134.

1855.

ARMITAGE v. WALKER.

THE "*Lancashire and Yorkshire Benefit Building Society*" was established in 1852, and its rules were certified and enrolled on the 19th of November in that year (a).

*Benefit Building Society—
Jurisdiction—
Objects—
Withdrawing Members—
Arbitration—Award—New Rules.*

In any proceedings at law or in equity respecting a Benefit Building Society, the primary consideration for the Court is, that the legislature has provided a cheap and summary mode of settling any question concerning their affairs by arbitration, with the intention carefully to provide that these societies should not be subjected to expensive litigation. The object of these societies is to raise a fund by means of which the members may be enabled to purchase land or houses. The mode by which this is to be done is by investing the subscribed moneys upon very advantageous terms under powers given them by statute.

Where the rules of such a society authorised the directors to invest the funds on mortgages for ten years at any rate of interest, or in building on or improving land mortgaged to them, and authorised members to withdraw their shares upon giving a certain notice, and provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid with interest, and also a share of profits, but no time was specified for making such payments; and the directors had power to pay such claims in the order in which they arose, the amount payable to a withdrawing member having been referred to arbitration:—*Held*, that it was competent to the arbitrator to consider, when, consistently with the due prosecution of the other objects of the society, such payment should be made, and to fix a time for such payment accordingly.

Held, also, that a Court of equity had no jurisdiction to alter the award, unless there was error upon the face of it, or it was shewn to have been corruptly obtained.

Therefore, where a principal sum and interest only were awarded, the Court would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not. The award directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after the member had given notice to withdraw:—*Held*, that this part of the award was bad, but, being separable, it did not vitiate the rest.

(a) The following were the most material of these rules:—

"DUTIES AND POWERS OF DIRECTORS.

"12. That the directors shall have the power to direct payment out of the funds of the society of all expenses incurred in the formation, management, and carrying on of the society; to direct payment of all claims upon the funds of the society

(allowed claims upon the funds by members being discharged in the order as to time in which they arise); and in all business hereby intrusted to their management, not less than five shall act. That it shall be lawful for, but not obligatory upon the directors, to direct payment of any yearly rents which may be in arrear, or any mortgage or other prior incumbrance to which se-

1855.
 ARMITAGE
 v.
 WALKER.
 Statement.

Upwards of two years before July, 1853, the Plaintiff, *Joseph Armitage*, became an original holder of ten shares

curities may be subject, and to take any transfer or other conveyance thereof in their names, to lay out money for the improvement of securities of which the society shall be in actual possession, or to complete any buildings which may have been left unfinished to the prejudice of the security of the society; to cover vacant land with buildings; to determine on the terms on which shares may be taken up in the society, either by old or new members; to determine on the amount of money to be paid by any mortgagor in full for the claims of the society upon his property, on payment of which the share or shares in respect of which the security was made shall be wholly extinguished; to lend any money belonging to the society on such mortgage of freehold or leasehold property, and at such rate of interest as they shall think proper, notwithstanding that the borrower may not be a member; to allow interest after the rate of 5*l.* per centum per annum to members paying their subscriptions twelve months in advance; to borrow or take up at interest from any banker or other party or parties any sum or sums of money for the use of the society upon such terms, for such period or periods, and at such rates of interest, and to repay the moneys so borrowed out of the funds of the society, either before or at

the expiration of the period or periods for which the same are so borrowed, as they shall think fit, with interest and all expenses incident to the borrowing and paying off the same; to determine the profits to be allowed in addition to the subscriptions paid in on account of each unpurchased share to members withdrawing such shares, which, after such determination and the announcement thereof at the monthly meetings, it shall be lawful for the directors to pay. Also to alter the amount of the fine to be paid on the transfer of any share or shares, whether purchased or unpurchased, or the biddings on purchased shares. Provided, that no money of the society shall be lent except the security for repayment thereof shall be a mortgage (with powers of sale, and all such other powers, covenants, and conditions, and in such manner as the solicitors of the society shall deem desirable or proper) of real or leasehold property, which, in the opinion of the directors, shall be a sufficient security for the money so lent; and in such mortgage or mortgages the day or time, or manner, for repayment of the sum so lent, and the interest at the rate of 5*l.* per cent. per annum, to become due by virtue thereof, shall be fixed so as not to exceed ten years from the commencement of the security; to direct the transfer by

of 60*l.* each in the said society, and the Plaintiff *Eliza Armitage* became an original holder of five such shares,

1855.
 ARMITAGE
 v.
 WALKER.
Statement.

the trustees of any securities to any other person or persons, and the reconveyance of any mortgage hereditaments on repayment of money due thereon; to direct the purchase of the equity of redemption, and other the interest of the mortgagor and all other persons in property vested in the trustees, and to lay out money for the repair and improvement of such property; and, where the property, estate, or interest so purchased shall comprise land which is uncovered, to lay out money in covering the same with dwelling-houses or other buildings, or direct the same to be sold on a rent to be reserved to the trustees, and to direct leases to be made thereof, and conveyances in fee subject to such rent; to direct the sale and disposition of the property so purchased, or the rents so reserved, and all other property from time to time vested in them, or any part thereof, by either public auction or private contract, and to direct the same to be bought in and re-sold without being answerable for any difference in price or other loss; and to direct leases to be granted of any buildings reserving rents; to order the commencement of any legal proceedings, or the defence thereof, or the same to be discontinued, settled, or arranged; and generally to transact any business which may arise in connection with the society

for which these rules do not provide."

"WITHDRAWING.

"24. Any member wishing to withdraw unpurchased shares may sign the form of notice contained in the schedule hereunto annexed, copies of which shall be kept by the secretary, who shall furnish the same on application; and after such notice has been delivered to the secretary, or to a district agent, before half-past eight o'clock at a monthly meeting, such member shall not be subject to any future fines in respect of shares withdrawn, but shall be entitled to receive from the society during the first year the net amount of subscriptions paid, deducting all fines previously incurred, and ten shillings and sixpence per share; if during the second year, the net amount of subscriptions paid, and interest, at not less than 5*l.* per cent. per annum, from the end of the first year thereof; and if at any time after the expiration of the second year, 5*l.* per cent. per annum from the expiration of the first year, and also such a share of the profits as the board of directors shall have determined upon at the last annual audit of the accounts. That it shall be lawful for any member to withdraw purchased shares from the society with the consent of the directors, and on such terms as they may direct."

1855.
 ARMITAGE
 v.
 WALKER.
 —
Statement.

and the Plaintiff *George Best* became an original holder of one such share. The Plaintiffs in every respect conformed to the rules of the society, and paid all sums of money payable by them respectively in respect of their said shares, which amounted in July, 1853, in the case of *Joseph Armitage* to 132*l.* 10*s.*, in the case of *Eliza Armitage* to 62*l.* 10*s.*, and in the case of *George Best* to 12*l.* 10*s.*

In July, 1853, the Plaintiffs *Eliza Armitage* and *George Best*, and in October, 1853, the Plaintiff *Joseph Armitage*,

“ALTERATION OF RULES.

“25. Any alteration or repeal of any of the existing rules of the society shall be considered at a general meeting, convened by notice signed by the secretary, in pursuance of a requisition for that purpose by seven or more of the members of the society; which requisition and notice shall be publicly read by the president at two monthly meetings before such general meetings shall be held for the purpose of such alteration or repeal, unless a committee of such members shall have been nominated for that purpose at a general meeting of the members of the said society, convened in manner aforesaid, in which case such committee shall have the like power to make such alteration or repeal; provided that such alteration or repeal shall be made with the concurrence and approbation of three-fourths of the members of the society present at such monthly meeting, or by the like proportion of a committee, if any shall have been nominated for that purpose; and

such notice shall be given of any such alteration or repeal as the directors shall think fit.”

“ARBITRATION.

“29. In case of dispute between this society, or the trustees thereof, and a member or person claiming to be a member, or any person claiming on account of or through a member, or any officer of the society, such dispute shall be referred to arbitration, pursuant to the said recited Acts, and particularly the said Act of 10 Geo. 4, c. 56, s. 27. At the first meeting of the society after the certifying of these rules, five arbitrators shall be named and selected, none of them being directly or indirectly beneficially interested in the funds of the society; and in each case of dispute the names of the arbitrators shall be written upon pieces of paper, and placed in a bag, and the three whose names are first drawn out by the complaining party, or by some one on his behalf, shall be the arbitrators to decide the dispute.”

respectively signed notices to withdraw their shares from the society in conformity with the 24th rule (a).

1855.
 ARMITAGE
 v.
 WALKER.
 Statement.

The reports shewed that large profits were made by the society previously to the month of July, 1853.

The Plaintiffs now filed the bill in this suit against the trustees of the society, stating, that, upon serving the aforesaid notices, the Plaintiffs respectively became entitled to receive out of the funds of the society the amounts which they had paid in respect of their shares, with interest at 5l. per cent. from the end of their first year of membership, and a proportionate share of the profits of the society; and that they had applied several times to the secretary of the society to pay the same; but that the secretary and the other officers of the society neglected to comply with their request, and alleged as a reason that the amounts could not be paid, because the funds of the society were not available for that purpose: and the bill stated that the funds were not available, because the officers of the society took upon themselves to lend the funds of the society to various persons on loans, to be repaid at distant periods, and on various securities, in the names of the trustees; and that, in consequence of the neglect of the society to pay the said claims, the Plaintiffs, through their solicitors, on the 21st of June, 1854, required the society, in conformity with the 29th rule (b), to appoint arbitrators to decide the matters in dispute between the Plaintiffs and the society, such matters having been only the amount of the principal and interest so payable to them respectively, and the amount of their respective shares of the profits.

The bill further stated, that on the 29th of June, 1854, the secretary of the society forwarded to the solicitors of

(a) Ante, p. 213.

(b) Ante, p. 214.

1855.
 ARMITAGE
 v.
 WALKER.
 —
Statement.

the Plaintiffs a copy of certain new rules which had been made since the withdrawing of the Plaintiffs from the society, one of which was an addition to the 24th rule as follows: "Should the monthly receipts from the members at any time be insufficient to meet all the current engagements of the society for builders, withdrawals, and the repayment of loans, &c., then, in every such case, one third of the actual net subscriptions received each month from the members shall be appropriated by the directors to the payment of withdrawals according to priority of notice; and all notices of withdrawals shall be entered in a book to be kept for that purpose, and the residue of the income of the society shall be appropriated for the other ordinary business thereof: Provided always, that should the society be called upon, or the directors deem it desirable, to pay off all or any of the loans contracted by the society, then the repayment of such loans shall take precedence of all other payments except the necessary expenses of management." The other alteration was an addition to the 29th rule, as follows: "That the complaining party shall give a written notice requiring arbitration, addressed to the secretary, stating the grounds of dispute, and thereupon deposit 20s. with the secretary, who shall fix the time for drawing the names of the arbitrators, and send the complainant notice by post at least two days before the time of such drawing. That the expense of arbitration not exceeding 20s. shall be paid by the losing party, or otherwise, as the arbitrators may determine. In case of an arbitrator being a member or other officer of the company, or refusing or neglecting to act, he shall cease to be an arbitrator, and every vacancy then shall be filled up at the next monthly or special meeting of the society."

The bill also stated, that, on the 1st of July, 1854, the Plaintiffs protested against being bound or affected by such alterations, and refused to comply therewith; and accord-

ingly the society appointed arbitrators in conformity with the 29th rule, as certified in 1852.

1855.

ARMITAGE
v.
WALKER.

Statement.

That the arbitrators met on the 7th of August, 1854, when the solicitors of the Plaintiffs objected to the alterations in the 24th and 29th rules being applied to the cases of the Plaintiffs. The arbitrators made three awards, all dated the 7th of August, 1854; and by one of them they awarded that the trustees of the society, and their successors or assigns, should pay to the Plaintiff *Joseph Armitage*, on the 7th of March, 1859, the sum of 132*l.* 10*s.*, and 36*l.* 19*s.* interest thereon; and that the Plaintiff *Joseph Armitage* should pay 20*s.* for the expenses of the said arbitration; and, by another, they awarded that the said trustees, their successors or assigns, should pay to the Plaintiff *Eliza Armitage*, on the 7th of December, 1858, the sum of 62*l.* 10*s.*, and 16*l.* 13*s.* 4*d.* interest thereon, and that she should pay 20*s.* for the expenses of the said arbitration; and, by the remaining award, they awarded that the said trustees, their successors or assigns, should pay to the Plaintiff *George Best*, on the 7th of December, 1858, the sum of 12*l.* 10*s.*, and 3*l.* 6*s.* 8*d.* thereon, and that he should pay 20*s.* for the expenses of the said arbitration.

The bill prayed a declaration that the Plaintiffs were not bound by the awards, and an injunction to restrain the Defendants, and the society and its officers, from enforcing the same; and a declaration that the Plaintiffs were not bound by the alterations of the 24th and 29th rules, but were entitled to the benefit of the 24th and 29th rules as the same were certified in 1852; and that the Plaintiffs were entitled to immediate payment out of the funds of the said society of the amount of the principal moneys paid to them in respect of their respective shares, with interest thereon respectively at 5*l.* per cent. per annum, from the expiration of the first year of their respective memberships; and also to the im-

1855.

ARMITAGE

v.

WALKER.

Statement.

mediate payment of shares of the profits made by the society up to July, 1853, in proportion to the amounts of their said respective shares in the said society; and that an account ought to be taken of what was owing to the Plaintiffs respectively on account of such principal and interest and shares of profits; and that the Defendants, the trustees, might be decreed forthwith to raise out of the funds of the said society the respective amounts which should be so found due and owing to the Plaintiffs respectively for such principal, interest, and shares of profit, and, if necessary for that purpose, should be decreed to call in the moneys which had been lent by the society, or a sufficient part thereof; and that the Defendants might be restrained, by injunction, from lending out any further part of the property of the society by way of loan, which should not be immediately repayable or available for the purposes of the society, until the amounts so claimed to be payable to the Plaintiffs respectively should have been discharged; and, if necessary, for an account of the amounts of the funds of the society which had been lent out on security or loans not immediately repayable or available for the purpose of meeting the claims of the said society.

Argument.

Mr. *Bagshawe*, jun. (Mr. *Rolt*, Q. C., with him) for the Plaintiffs.

The award is bad, and the Plaintiffs seek to have it removed out of their way, and to have immediate payment of their claims with interest. [VICE-CHANCELLOR.—If the question be the subject of arbitration, it has been decided in *Ex parte Payne* (a), that this Court has no jurisdiction.] But if the award be bad, the Plaintiffs cannot be

(a) 5 Dowl. & L. 679.

obliged to go again before the arbitrators, who, of course, will make again the same award, and therefore this Court must have jurisdiction: *Heming v. Swinnerton* (a), *Nichols v. Roe* (b). On the face of it this award is bad; because it postpones the time of paying the principal and interest moneys awarded to be due to the Plaintiffs, it does not award anything for profits, according to the 24th rule, and the interest awarded is computed from the date of the award. [VICE-CHANCELLOR.—The principal sums awarded probably consist partly of interest, which would be capable of computation to the date of the award; the interest awarded is only in respect of the time subsequently to elapse before payment.] The calculation shews that it is not so. Then the sums of 20s. awarded for costs are so awarded under a rule made after the withdrawal of the Plaintiffs, and which cannot be binding upon them.

Mr. Daniel, Q. C., and Mr. Selwyn for the society were not heard.

1855.
 ARMITAGE
 v.
 WALKER.
 —
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

I do not mean to express any opinion upon the principal point which has been raised. I think it is a grave question that might require a great deal of consideration. Mr. *Bagshawe* has done ample justice to the case on his part. But the first and primary consideration for any Court is, that by the 27th section of the 10 Geo. 4, c. 56, the legislature intended carefully to provide that these societies should not be dragged before Courts of law or equity if

(a) 2 Ph. 79.

(b) 3 Myl. & K. 431.

1855.
 ARMITTAGE
 v.
 WALKER.
 —
Judgment.

it could possibly be avoided, and has taken care to enact, that the whole discussion of their affairs shall be disposed of in a cheap and summary manner, by the decision of an arbitrator or justice, as the parties shall choose; and when they have once made their election, the power of the justice or of the arbitrator, acting always within the rules of the society, is complete, and is not subject to revision by any Court of law or equity. That is the primary matter to which attention must be drawn; and it is necessary to be extremely careful that the jurisdiction of this Court shall not be set up to control the arbitrators so selected, except upon a very clear and distinct case being made out of their abuse of their office.

Now the question I have before me is this: The Plaintiffs are members who have retired under certain rules which were in force at the time of their retirement. Indeed, I may go further back. Before I consider the rules of the society, I take the purposes of the society to be defined by the 6 & 7 Will. 4, c. 32. The preamble of that statute recites, that, "Whereas certain societies called Building Societies have been established in different parts of the kingdom, principally amongst the industrious classes, for the purpose of raising, by small periodical subscriptions, a fund to assist the members thereof in obtaining a small freehold or leasehold property, and it is expedient to afford encouragement and protection to such societies and the property obtained therewith;" and then the 1st section enacts, "that it shall and may be lawful for any number of persons in *Great Britain* and *Ireland* to form themselves into and establish societies for the purpose of raising, by monthly or other subscriptions of the several members of such societies, shares not exceeding the value of 150*l.* for each share, such subscription not to exceed in the whole twenty shillings per month for each share, a stock or fund

for the purpose of enabling each member thereof to receive out of the funds of such society the amount or value of his or her share or shares therein, to erect or purchase one or more dwelling-house or dwelling-houses or other real or leasehold estate, to be secured by way of mortgage to such society until the amount or value of his or her shares shall have been fully repaid to such society with the interest thereon." Therefore every man entering into a society of this description knows that its primary purpose is to enable all those who are at the time, or may become, subscribers, to raise a fund out of which they shall be able to make purchases of land and buildings; and that the mode of doing this is by means of advantageous investments on which they are empowered to lay out the money subscribed, principally with their own members. Under that Act this society was formed; and the powers, objects, and duties of the directors are defined by the 12th of its rules, which points out the general objects of the society. [His Honour read the first part of this rule.] A subsequent part of the same rule enables the directors to lay out money for the repairs of the property. And it is also provided, that directors may take mortgages which are not to last more than ten years.

1855.
 ARMITAGE
 v.
 WALKER.
 Judgment.

The Plaintiffs, then, became members of a society, the object of which the legislature has provided shall be to raise capital for purchasing property by investing the subscribed money at high rates of interest. The society was also to be at liberty to lay out large sums of money in building and otherwise at interest: therefore, upon the very face of the thing, the Plaintiffs must have foreseen that from time to time the funds of the society would be largely applied for the various purposes which it had generally in view, and that the object of the society would mainly be, so to apply its funds as to realise considerable profits in order to enable the members who might belong to it from time to

1855.
 {
 ARMITAGE
 v.
 WALKER.
 —
Judgment.

time to become holders of land and houses. I may call this the business of the society. Then there is a rule which enables members to withdraw on certain terms. [His Honour read the 24th rule.]

It is not distinctly stated at what time the payment thus directed is to be made. It is to become a debt immediately due.

Referring again to the 12th rule as to the powers of the directors, I find that they have power to direct payment out of the funds of the society, amongst other things, "of all claims upon the funds of the society, allowed claims upon the funds by members being discharged in the order as to time at which they arise." I think, upon the face of that rule, it was contemplated that there would arise the case of allowed claims not to be discharged instantaneously. One can hardly give any other sense to that clause. It has been suggested that it may mean, as no doubt it does amongst other things, other claims on the society by the withdrawing members. But still a withdrawing member is *pro tanto* a member, for the purpose of having a claim allowed; and if it is necessary to refer to any authority, that is proved by the case of *Ex parte Payne* (a). He is treated as a member, for the purpose of the arbitration, until his rights are determined. I will not say that he is to be bound by rules subsequently made. I am not considering it in that point of view; but he is certainly within the terms of allowed claims upon the fund by members which are to be discharged in the order as to time in which they arise. The Plaintiffs, then, being members of a society like this, bound by all its rules and regulations, and the object of the society being to carry on their business and to obtain other profits, and the directors being empowered to pay claims

(a) 5 Dowl. & L. 679.

according to the order in which they arise, shewing that it was contemplated from the first that there might not be funds at the time when a claim itself became due; and the only clause as to withdrawing members expressing that they are to be entitled to receive certain payments out of the funds, with a provision for payment of interest at 5*l.* per cent., which would be a compensation for any delay in making payment—I think under those circumstances I should have held, independently of the new rules which were afterwards made, that it was competent to any arbitrator, in a matter of this kind, to look at all the affairs of the society, to determine what was just, proper, and right to be done; and, considering the powers of the directors to see how far, consistently with the general objects of the society being carried out, the withdrawing members could be conveniently paid,—the directors have power to decide upon it prior to dispute, but in case of dispute, the arbitrator having authority to settle the matter for them,—it would then be competent for him to take upon himself those duties, and to say, I have examined the whole of this matter: I am of opinion that the payment should be made at a certain fixed time, at which time I, looking at all the affairs of the society, think there will be funds in hand properly applicable to this particular debt.

1855.
 ARMITAGE
v.
 WALKER.
Judgment.

Then I have to consider whether the rule which was afterwards made as a modification in some sense of the 24th rule, affected the rights of the Plaintiffs. As the awards upon the face of them awarded 20*s.* to be paid in respect of costs, I could scarcely avoid coming to the conclusion that the arbitrator in making his awards had before him the new rules, because one of such new rules refers to the payment of 20*s.*

The question remains, whether that new rule at all varied the condition of the Plaintiffs. I apprehend that the only

1855.
 ARMITAGE
 v.
 WALKER.
 Judgment.

effect of that rule, as I read it, was to restrict the powers of the directors. [His Honour read it.]

It took it out of the power of the directors to say : "We are the judges of what is the best mode of effecting these several purposes ; what is the order of paying the claims and the order of the money to be laid out in future." They were to be tied down, and not allowed more than a certain sum of money out of these funds in the settlement and liquidation of these particular claims. Even if the arbitrator did look at that rule, all the effect of it was, that when the matter was referred to him the whole power, in fact, was taken out of the directors, if I may so express it, and it was referred to him to act for all parties, both for the directors and the others, to direct anything to be done by them that they had the power to do, and he was to determine what was fit and proper to be done with regard to the whole case ; and I think, if he did regard the new rule, he did not decide any more than he had full power to do under the old rules.

Other difficulties have been suggested on the face of the awards. I think that I cannot consider anything which is not upon the face of the awards. The only reason for my entering into this question is because, on the face of the awards, there is that 20s. ; otherwise I should be perfectly clear that the arbitrators were acting within their jurisdiction, and cannot be controlled in respect of any error alleged upon extrinsic evidence or anything short of corruption. This very case shews the enormous inconvenience that would arise, because here is a mass of evidence of all that passed before the arbitrator, upon which I cannot form any judgment, nor have I any right to form any judgment whether the arbitrator was right or wrong, in the conclusion to which he has come. All that I have to look to is whether there is any error upon the face of the award, or whether it appears that the arbitrator has

decided otherwise than according to the rules and regulations of the society. I find, then, upon the face of the award, that he awarded so much principal money to be paid and so much interest.

1855.
ARMITAGE
v.
WALKER.
Judgment.

Now, in the first place it is argued that nothing was awarded in respect of profits, and that the arbitrator ought to have said whether there was anything due for profits or not. In strictness, I have no right to know how many payments the Plaintiffs have made. He has awarded, for instance, 132*l.* 10*s.* principal, and 36*l.* 19*s.* 11*d.* for interest thereon. For aught I can understand, or for aught that I have a right to know, the 132*l.* may include the profits. The arbitrator may have followed the Act, and awarded a lawful sum and awarded interest thereon. I have no right to know anything more. In point of fact, it appears, if I had a right to look at it, that the 132*l.* 10*s.* is the exact amount of the payments made, and nothing more. If it be so, the substantial way of considering it would be to say that he has awarded no profits.

Mr. Bagshawe.—It was proved in the cause.

The VICE-CHANCELLOR.—My difficulty is, what right I have to know it. All I have to look at is, whether there is any error on the face of this award, unless you can prove corruption. If he had awarded 100*l.*, although this Plaintiff had paid 132*l.*, the Plaintiff could not, by proving that, touch this award. The arbitrator may have been mistaken upon the evidence, but I could not get behind the award, unless the error was so gross as to amount to evidence of corruption. Otherwise, I should have to try the whole case over again, which is the very thing which, in all these cases, is intended to be avoided. I must take it to be an award that the sums mentioned are the whole principal moneys due to these parties.

1855.
 ARMITAGE
 v.
 WALKER.
 —
Judgment.

Then, with respect to the interest, the objection is still stronger. It is a very nice calculation of interest—by no means an easy matter. Mr. *Bagshawe* said, that if I added up this sum, I should find that it would give 5 per cent. from the date of the award, with an additional year's interest. How am I to know whether that is rightly calculated? It is a somewhat nice calculation upon these payments of 2*l.* 10*s.* per month and 1*l.* 8*s.* per month and interest from those respective months and days of payment. In other words, it would come to this, that the arbitrator is wrong in matter of fact. That I cannot touch unless it appears on the face of the award.

The only thing that might have made it necessary to hear counsel for the defence was, what I think to be a point of some nicety—namely, how far the Plaintiffs would be bound by rules made subsequently to the time of their having given notice to withdraw—that is, as to the sum of 20*s.* ordered to be paid for expenses of arbitration. The arbitrator had only power to order that to be done by a rule passed after the parties withdrew. There was no rule previously enabling him to award anything for costs. But it is a matter which is clearly severable. Where part of an award is extra vires and severable, the Court rejects that part and upholds the rest of the award. I understand no claim is made or ever has been to this 20*s.*

Mr. *Daniel*.—It was never suggested.

The VICE-CHANCELLOR.—That seems to be the only thing that the Court could properly interfere to restrain. If it had been a larger sum, it might have been considered important enough to have the point argued. If it had been discussed, and if upon the argument I should have been satisfied that it was extra vires, all I should have done would have been to stay the proceedings as to that part

which is extra vires. I understand it has never been claimed, and I think it ought not to alter my decision in this case. Therefore, I think it is incompetent to me,—and I must say I am not at all sorry that it is; for I think it is of the utmost importance that these societies should not be urged into this sort of litigation,—it is wholly incompetent to me to deal with this award, and I must therefore dismiss the bill, with costs.

1855.
ARMITAGE
v.
WALKER.
Judgment.

COGSWELL v. ARMSTRONG.

Dec. 12th &
14th.

JOHN ARMSTRONG, by his will, in 1847, devised to his daughter *Maria*, her heirs and assigns, all that his messuage and hereditaments (describing them) at *Brampton* in *Cumberland*; and he charged the said property with the payment of 100*l.* to his daughter, the Plaintiff, which he gave and bequeathed to her; and, after making several specific bequests, he devised as follows: "And I give, devise, and bequeath *all other real and personal estate of which I may die possessed* unto and equally among my children," [then followed the names of all the testator's children (six in number) other than the Defendant *Thomas*, his eldest son and heir at law, but including *Maria*,] "and their several heirs, executors, and administrators."

Wills—7 Will
4 & 1 Vict. c.
26, s. 25—
Lapsed Devise
—*Residuary*
Devise—"All
other."

Testator by his will, in 1847, devised specific real estate to his daughter *M.*, and, after making several specific bequests, devised and bequeathed *all other real and personal estate of which he might die possessed*, to *M.*, and others of his children. *M.* died in his lifetime:—*Held*, that the devise expressed by the words "all

Maria died in the testator's lifetime.

The question was, whether the *Brampton* estate, devised

other, &c.," was a residuary devise within 7 Will. 4 & 1 Vict. c. 26, s. 25, and included the real estate devised to *M.*

1855.
 COGSWELL
 v.
 ARMSTRONG.
 —
Statement.

to *Maria*, passed by the subsequent devise of "all other" real estate of which the testator might die possessed, or whether the heir was entitled to that estate freed from the legacy of 100*l*.

Argument.
 —

Mr. *James*, Q. C., and Mr. *Cairns*, for the Plaintiff.

On *Maria's* death the devises to her lapsed, and the devised estate at *Brampton* became part of the residuary devised real estate. To *Maria's* share in that residuary devised real estate, including the *Brampton* estate, the defendant *Thomas*, on the testator's death, became entitled as his heir at law; but that share is all to which he became entitled.

The words "all other real estate of which I may die possessed," are a residuary devise within the 25th section of the stat. 7 Will. 4 & 1 Vict. c. 26. There can be no distinction between the words "all other" and "all the rest."

Evans v. Jones (a) was a stronger case than the present against extending the residuary gift; and *Wainman v. Field* (b) depended upon special circumstances (c), which here do not occur.

Mr. *Daniel*, Q. C., and Mr. *H. R. Bagshawe*, for the Defendant *Thomas Armstrong*.

By the death of *Maria* in the lifetime of the testator, the Defendant *Thomas*, as the testator's heir at law, became entitled to the whole of the devised estate at *Brampton*, freed from the legacy of 100*l*. bequeathed to the Plaintiff.

(a) 2 Coll. C. C. 516.

(b) *Kay*, 507.

(c) *Id.* 513.

The 25th section of the Act does not apply. That section speaks of "the residuary devise, *if any*, contained in the will." It presupposes a residuary devise, and has no application where there is none. Here there is no residuary devise within the meaning of the 25th section. The word "other" means other than the real estate previously devised. How then can it include that estate? The rule that the heir at law is not to be disinherited unless by a devise clearly and unambiguously expressed, is still in force.

1855.
COGSWELL
v.
ARMSTRONG.
Argument.

Mr. *Rasch* for the other children.

[His Honour reserved judgment in order to examine a case in which he believed a distinction had been taken between the words "all other" and "all the rest and residue."]

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.
Dec. 14th.

The case to which I referred as raising a doubt upon the word "other," is that of *Scott v. Scott* (a).

It is laid down by Lord *Hardwicke* in *Hanby v. Roberts* (b), that a legatee is not entitled to stand in the place of a specialty creditor against a specific devisee of real estate, because it was as much the testator's intent that the devisee should have the specific real estate, as that the legatees should have their legacies. But he said it was otherwise in the case of a *residuary* devisee, as to whom no specific intention appeared by the will. That observation of Lord *Hardwicke's* is best reported in *Dickens*, where the case appears under the name of *Hamly v. Fisher* (c).

(a) 1 Eden, 459.

Hamly v. Fisher, Dick. 105.

(b) Amb. 127; S. C. nom.

(c) Dick. 105.

1855.
 COGSWELL
 v.
 ARMSTRONG.
 Judgment.

There Lord *Hardwicke* says: "If a man die indebted, and, having both land and personal estate, give general pecuniary legacies, and all the rest and residue to another person, and the specialty creditors exhaust the personal estate, the legatees shall stand in their place against the residuary devisee, because the residue is not given as a specific thing."

Alexander, C. B., in *Spong v. Spong* (a), took no notice of the distinction drawn by Lord *Hardwicke*. He said it was admitted that in the case of a residuary devise the charge took place, and he could see no difference between specific and residuary devises, all devises of freeholds being specific (b); and he decided accordingly. The House of Lords, however, reversed his decision (c). They adverted (d) to the doctrine of Lord *Hardwicke* in *Hanby v. Roberts*, as to the distinction in the marshalling of assets between residuary and specific devises; and held that the former could be reached by legatees, but the latter not.

Now, in *Scott v. Scott* (e), there was a devise of "all other the testator's real estates not therein before devised" to his eldest son, his heirs and assigns, but in case he should die without issue before twenty-one, over; and Lord *Northington* held that it was a specific devise of the real estate to the eldest son, since he took a different estate from what he would have had by descent, and that the legatees could not resort to it. Yet the only difference between that case and the case put by Lord *Hardwicke* was, that in *Scott v. Scott* the devise was of "all other the testator's real estates not therein before devised;" and in the case put by Lord *Hardwicke*, it was of "all the rest and residue."

But whether any distinction could or could not have

(a) 1 Y. & J. 300.

(d) Id., p. 106.

(b) Id. 310, 311.

(e) 1 Eden, 459.

(c) S. C. 3 Bli. N. S. 84, 106.

been taken under the old law between the words "all other" and "all the rest and residue," it is clear that the late Wills Act (7 Will. 4 & 1 Vict. c. 26, s. 25) has made a great difference on this point. There is no doubt as to the soundness of the reasoning of *Alexander*, C. B., in support of the position that, by the law as it then stood, all devises of real estate were specific. He says: "A man cannot give by a will any freehold estate but what he actually has at the time of making his will. And as the corpus to be given is perfectly ascertained and identified, it matters little whether it is in the will called by its name, or whether it is described only as the estate of its owner. The testator has as much the intention that the devisee shall have that specific estate, as he has that the other devisees shall have the other estates which he has more fully described. It is quite otherwise with respect to personal estate, which is always floating, and as to which a residuary bequest never has anything precise or defined" (a). But the statute, by allowing the will to pass after-acquired property, has now brought real estate, for the purposes of this question, into exactly the same position as personal estate; and a residuary devise may be as destitute of anything precise or defined as a residuary bequest.

I am of opinion that in this case the devise expressed by the words "all other real and personal estate of which I may die possessed," was a residuary devise within the 25th section of the Act; and, no contrary intention appearing by the will, included the real estate comprised in the devise to the testator's daughter *Maria*.

There must be a declaration to this effect; and I must order the 100*l.* and interest to be raised by sale of the real estate comprised in the devise to the testator's daughter *Maria*.

(a) 1 Y. & J. 311.

1855.
COGSWELL
v.
ARMSTRONG.
Judgment.

1855.

May 22nd &
25th, and
July 2nd &
24th (a).

Contracts—
Solicitor and
Client—
Crassa Negli-
gentia—*Mis-*
take in Prac-
tice—*Interro-*
gatories—
Cross Interro-
gatories—*Bill*
of Costs.

Where a soli-
citor has been
retained for,
and has un-
dertaken a
particular
business, his
bill of costs
for carrying
that business
through to its
conclusion is
but one bill;
and where the
business in
question is the
prosecution of
a suit, and the
solicitor has,
by his *crassa*
negligentia in
the conduct of
the suit,
caused the
suit to be lost,
he cannot re-
cover any por-
tion of his bill.

STOKES v. TRUMPER.

IN December, 1845, the Rev. *John Trumper*, vicar of *Clifford* in *Herefordshire*, and the Rev. *Francis Trumper*, the minister of *Clifford*, retained Mr. *Pugh*, as their solicitor, to commence and prosecute an information against the trustees of the *Clifford* charity for various breaches of trust alleged to have been committed by them or one or more of them.

Pugh accordingly filed an information against *Dew*, *Gowland*, *Delahay*, and *Lee-Warner*, the trustees of the charity, stating various breaches of trust on the part of the Defendant *Dew* in the management of the charity property, and that the other trustees had never interfered to correct or prevent the acts of mismanagement of which the information complained, and praying (*inter alia*) that the trustees might be personally charged with all sums misapplied by them.

In the course of the proceedings in the suit, the Defendants *Gowland* and *Lee-Warner* were examined in chief on behalf of their co-Defendant *Dew*, who had obtained an order for that purpose. The same witnesses were afterwards examined upon interrogatories for the examination of

In a cause, commenced by information, the relators' solicitor intending to cross examine two Defendants who had previously been examined in chief on behalf of a co-Defendant, such Defendants were, by mistake, examined upon interrogatories for the examination of witnesses in chief on the part of the informant, and, by reason of this mistake, the information was dismissed, with costs:—*Held*, that the mistake was *crassa negligentia* on the part of the solicitor, and disentitled him to recover any portion of his bill of costs.

(a) The report of this case has been delayed, in consequence of the Editors being unable to obtain the requisite papers.

witnesses in chief on the part of the informant. No order was obtained for the purpose of this last-mentioned examination, which was had without the witnesses' consent, and without withdrawing replication.

1855.
STOKES
v.
TRUMPER.
Statement.

Upon the cause coming on to be heard before Vice-Chancellor *Knight Bruce*, it was stated on behalf of the informant that the examination of the Defendants *Gowland* and *Lee-Warner*, as witnesses in chief on the part of the relators, arose from a mistake, the intention having been to cross-examine them only. But his Honour held, that, by reason of their examination on the part of the informant, no decree could be made against the Defendants *Gowland* and *Lee-Warner*, and that the 32nd Order of August, 1841, did not, under the circumstances of the case, entitle the informant to relief against the other trustees; and the information was dismissed with costs.

On a motion subsequently made on behalf of the informant to suppress the depositions of *Gowland* and *Lee-Warner*, it was ordered by Vice-Chancellor *Knight Bruce* that they should be suppressed upon certain terms mentioned in the order; his Honour being of opinion that the circumstance of their being examined in chief in support of the information, in support of which they might have been, as *Dew's* witnesses, cross-examined, was attributable to error and want of knowledge, and to no design or intention of abandoning the case against them. On appeal to Lord *Cottenham*, C., this order was discharged, the Lord Chancellor being of opinion that, even on these terms, the relators could not be relieved from the mistake (a).

The relators died; the present suit was instituted by the executor of the survivor for the administration of his

(a) A report of these proceedings will be found nom. *Attorney-General v. Dew*, 3 De G. & S. 488.

1855.
 ———
 STOKES
 v.
 TRUMPET.
 ———
Statement.

estate ; and, under the common advertisement for creditors, a claim was carried in by *Pugh*, claiming to be a creditor in the sum of 1231*l.* 17*s.* 4*d.* for work done and materials for the same provided upon the relators' retainer, and for fees due and payable to him in respect thereof in the prosecution of the information.

The amount of *Pugh's* bill of costs up to and inclusive of the date of the Lord Chancellor's order, was 1123*l.* 8*s.* 3*d.* The rest of the bill was made up of the costs of Defendant *Delahay*.

Pugh, by an affidavit in support of his claim, deposed as follows :—

“ The Defendant *Dew* having obtained an order for the examination of the Defendants *Lee-Warner* and *Gowland*, I, having considered their evidence material on behalf of the relators in this information, but being in doubt whether the statute 6th & 7th Vict. c. 85, enabled the informant to examine these Defendants and have a decree against them, consulted our counsel who drew the information and pleadings, namely, Mr. *Wray*,—and Mr. *Wray*, in his opinion, dated the 20th of February, 1849, stated among other things, that notwithstanding their being interested witnesses, they might by the then late Act be examined by or on behalf of the relators. On the 18th January, 1849, previous to my obtaining Mr. *Wray's* opinion, *Bodenham* (the Defendants' solicitor) and myself agreed that the commissioner should be at liberty to cross-examine any of the witnesses examined on the part of the informant or of the Defendant *Dew* at any time after the examination of such witnesses in chief, and notwithstanding any other witnesses might have been called and examined on behalf of either of the said parties in the meantime; which said agreement was written by *Bodenham* and signed

by *Bodenham* and myself. The commission was opened on the 17th of January, 1849, and the informant's witnesses were first examined, and at the close of their examination I shewed the commissioner the agreement so signed by *Bodenham* and myself for the cross-examination of the witnesses, and as I had no cross interrogatories and could not be in the commissioner's room at the time when the Defendant's witnesses were called, it was arranged that I should put down on a piece of paper the numbers of our interrogatories in chief, from which the commissioner was to cross-examine *Lee-Warner* and *Gowland* on behalf of the informant. *Lee-Warner* and *Gowland* were called on behalf of the Defendant *Dew*, and examined. Some days after I received Mr. *Wray's* opinion, and I had in the meantime seen *Daniell's Chancery Practice* by Mr. *Headlam*, who in pages 851 and 852 of his book expressed a strong opinion, that, since the statute 6th & 7th Vict. c. 85, a Defendant might be examined on behalf of a Plaintiff, and a decree had against him, notwithstanding his having been so examined. However, I did not consider that it was necessary that *Lee-Warner* and *Gowland* should be examined in chief as witnesses on behalf of the informant, but only that they should be cross-examined, and such was my intention when I gave the aforesaid directions to the commissioner. I was not aware that the commissioner had put down the answers of *Lee-Warner* and *Gowland* to the informant's interrogatories in chief without any observation as to the agreement entered into between *Bodenham* and myself, until after this cause had passed publication. I relied on the said agreement signed by *Bodenham* and myself as a sufficient authority for the purpose of enabling the commissioner to put questions to *Lee-Warner* and *Gowland* by way of cross-examination after their examination in chief on the part of the Defendant *Dew* had been finished. The relator *Francis Trumper* attended with me at the *Swan Hotel, Hay*, every day during the execution of the said commission, and in

1855.
 STOKES
 v.
 TRUMPER.
 Statement.

1855.
 STOKES
 v.
 TRUMPER.
 —
Statement.

consequence of conversations which he stated he had with the Defendants *Lee-Warner* and *Gowland*, in which they admitted they had not interfered with the management of the *Clifford* charity since they were appointed trustees, except occasionally meeting the Defendant *Dew* at *Peterchurch* and auditing his accounts,—and their residence being a considerable distance from the parish of *Clifford*, he pressed and insisted on my causing questions to be put to them after they were called in chief by the Defendant *Dew*, and I also considered that their evidence was material on behalf of the informant, as the prayer of the information against them was for their dismissal from the trusteeship of the charity; and I considered myself justified in the course I pursued, from having perused the statute 6th & 7th Vict. c. 85, and *Daniell's Chancery Practice* by *Headlam*, and also from having received the opinion of our counsel, Mr. *Wray*, before referred to."

Mr. *Wray's* opinion of the 20th of January, 1849, was as follows:—"I do not think it will be at all prudent to cross-examine the Defendants at present. They are interested witnesses; and, although by the late Act they may, notwithstanding, be examined, yet, if the relator cross-examine them, he deprives their evidence of the objection that they are not to be trusted to on that score. The relators' case will, I think, be better without them. For the like reason, I would not cross-examine any other witness."

In Mr. *Pugh's* bill of costs, under date the 20th of January, 1849, was this charge: "Drawing statements to lay before *Wray*, to advise *whether we should proceed to cross-examine Defendants' witnesses*, and to prepare interrogatories."

The claim was resisted, upon the ground that the in-

formation had been dismissed with costs, by reason of *Pugh's* mistake in examining the witnesses in chief.

1855.
STOKES
v.
TRUMPER.
Statement.

The claim now came on for consideration upon adjournment from Chambers.

Mr. James, Q. C., and Mr. Renshaw, for Mr. *Pugh*.

Argument.

The mistake, if it be a mistake, is not such as to disentitle Mr. *Pugh* to recover the amount of his bill of costs. It was a mistake in a difficult and doubtful point of practice, and was caused *first* by the language of the Act 6 & 7 Vict. c. 85, which, if it does not expressly authorise such a course as Mr. *Pugh* adopted, at least gave ample room for doubt whether that was not a proper course to adopt, as is proved by the conflicting decisions to which the Act has given rise, *e. g.*, *Wood v. Rowcliffe* (a) and *Monday v. Gruyer* (b); the last of which decisions is in direct opposition to the former. Even as late as 1851, Lord *Truro*, C., in *Rowland v. Witherden* (c) considered it a question open to argument, whether, since the Act, a decree cannot be made against a Defendant, notwithstanding he has been examined as a witness in the suit; and observed, in reference to this very case, "The effect of this statute does not appear to have been adverted to in the *Attorney-General v. Dew*." In *Rowland v. Witherden*, the Defendant who had been examined was a mere formal Defendant, and the point was on that ground left unargued and undetermined. [The VICE-CHANCELLOR.—Could you not have appealed in the *Attorney-General v. Dew*?] . Not without the relators' authority; not on the sole authority of *Pugh*. The mistake was caused, *secondly*, by the statement of the law in

(a) 11 Jur. 707.

(b) Id. 861.

(c) 3 M'N. & G. 568.

1855.
 STOKES
 v.
 TRUMPER.
 —
Argument.

Mr. *Headlam's* edition of *Daniell's Chancery Practice*, p. 851, which is in favour of the course adopted by Mr. *Pugh*, and which he deposes that he had read. And it was caused, *thirdly*, by the opinion of his counsel, Mr. *Wray*, whose opinion he had taken, and who stated that, notwithstanding the Defendants were interested witnesses, they might by the then late Act be examined on behalf of the relators. [The VICE-CHANCELLOR.—That part of the affidavit appears to misrepresent the effect of Mr. *Wray's* opinion. He says, "they may, notwithstanding, be examined." He does not give any opinion as to the propriety of examining them in chief on the part of the relators. All he says is, that he does not think it will be at all prudent to *cross-examine* them.] Be that as it may, the mistake is excusable upon the other grounds on which we rely; and a mistake occasioned under such circumstances is not *crassa negligentia*, and does not disentitle a solicitor to the amount of his bill of costs.

Upon this subject the authorities are clear. In *Baikie v. Chandless* (a), Lord *Ellenborough* says, "An attorney is only liable for *crassa negligentia*; and it is impossible to impute that to the Defendant for not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a very doubtful construction of the statute." In *Elkington v. Holland* (b), where one of two judges doubted as to the sufficiency of an attorney's attestation, it was held by both, that, even if insufficient, the attorney was not guilty of that *crassa negligentia* which disentitled him to recover, the mistake being made in construing a doubtful Act of Parliament; *Parke*, B., observing, "He has not infringed any plain rule of law or point of practice; the utmost that can be said is, that he has misconstrued a doubtful Act of Parliament." And *Alder-*

(a) 3 Camp. 17, 20.

(b) 9 M. & W. 659, 661, 662.

son, B.: "It would be most unfair if an attorney were to be precluded from recovering his fair remuneration merely because he has made a mistake in construing a doubtful Act of Parliament." *Laidler v. Elliott* (a) and *Kemp v. Burt* (b) were decided on the same principle, that the error in the interpretation of a doubtful rule of Court, or doubtful Act of Parliament, is not *crassa negligentia*. And, lastly, in *Purves v. Landell* (c), Lord Campbell lays it down, that, in order to maintain an action for negligence, "it is necessary that the professional adviser should be guilty of some misconduct—some fraudulent proceeding, or should be chargeable with gross negligence, or with gross ignorance. It is only upon one or other of these grounds that the client can maintain an action against the professional adviser" (d). And again, "it is only if he has been guilty of gross negligence; because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake. You can only expect from him that he will be honest and diligent; and if there is no fault to be found either with his integrity or diligence, that is all for which he is answerable" (e). [The VICE-CHANCELLOR.—The error *Pugh* has made seems to have been, that he so conducted what he intended to be a cross-examination as to make the depositions evidence in chief. Had he cross-examined, his clients might have got a decree.] Cross-examination would not have answered his clients' purpose, which was not to discredit, but to get from the witnesses facts, in their knowledge, material to the relators' case; and for this purpose it was necessary to get the evidence in such a form that he could be sure of being able to read it, which he could not have been had he simply cross-examined.

1855.
STOKES
v.
TRUMPER.
Argument.

(a) 3 B. & C. 738.

(d) *Id.*, p. 102.

(b) 4 B. & Ad. 424.

(e) *Id.*, p. 103.

(c) 12 Cl. & F. 91.

1865.
 STOKES
 v.
 TRUMPER.
 —
Argument.

[The VICE-CHANCELLOR.—That argument seems scarcely consistent with the case made by Mr. *Pugh*. The whole case made by him in the *Attorney-General v. Dew*, and in his affidavit upon the present occasion, is, that he intended to cross-examine—that the examination in chief was an unfortunate error. Do any of the authorities apply to the case of such an error—an error in a point of practice in the conduct of a cause? That is a department for which the solicitor is supposed to make himself peculiarly responsible.]

Purves v. Landell and *Kemp v. Burt* apply to such a case. And this was a point of practice which the statute had rendered unsettled.

Besides, it is clear from the evidence that the error arose from there being no cross interrogatories at hand, and was attributable at least as much, if not entirely, to the Commissioner; and that this was the opinion of the Judge is clear from his suppressing the depositions.

[The VICE-CHANCELLOR.—I feel the difficulty—and it is a very great difficulty—as to the construction of the Act. But, looking to the case made by Mr. *Pugh*, it seems to me that the idea of sheltering him under the obscurity of the Act is an after-thought on your part. The course he intended to take, and which, but for this mistake, he would have taken, would have avoided all the difficulty you attribute to the Act. He has launched his client into the difficulty by a gross mistake. The only argument you urge for him seems to be, that, had he done deliberately what, in fact, he did by this mistake, he would not now be chargeable with *crassa negligentia*.]

He thought the Commissioner would take down the answers of the witnesses as answers on cross-examination.

[The VICE-CHANCELLOR.—But that was a great mistake.]
It is the merest technical distinction which in this Court is
taken between examination in chief and cross-examination.

1855.
STOKES
v.
TRUMPER.
Argument.

Mr. *Charles Hall* (in the absence of Mr. *Rolt*, Q. C.) for
the Plaintiff.

This claim must be disallowed. The authorities shew
that a solicitor “is liable for the consequences of ignorance
or non-observance of the rules of practice of the Court, for
want of care in the preparation of the cause for trial, or of
attendance thereon with his witnesses, and for the mis-
management of so much of the conduct of a cause as is
usually and ordinarily allotted to his department of the pro-
fession: per *Tindal*, C. J., in *Godefroy v. Dalton* (a). He
must exercise proper caution: *Montrieu v. Jefferys* (b).
And it is not sufficient for him to shew that he has had the
best intentions, and that the miscarriage has arisen from
inadvertence: *Hill v. Featherstonhaugh* (c). The client
is entitled to expect from his solicitor the same degree of
skill, diligence, and caution which is expected from engi-
neers, medical men, and other professional persons.

And where a solicitor brings a claim like the present, it
lies with him to shew affirmatively that he has done all
that he ought to have done, and not with the client to shew
negatively that the solicitor has not done his duty: per
Lord *Tenterden*, C. J., in *Allison v. Rayner* (d). This the
Defendant has not shewn; on the contrary, it is clear that
he has committed an error in a part of the conduct of the
cause which, in the words of *Tindal*, C. J., is “ordinarily
allotted to his department of the profession.” In *Purves*
v. Landell it is admitted, that misconduct would render a
solicitor liable, and we have misconduct here.

(a) 6 Bing. 468.

(c) 7 Bing. 569.

(b) Ry. & M. 317.

(d) 7 B. & C. 441.

1855.
 STOKES
 v.
 TRUMPER.
 —
Argument.

As to his defence, that he was supported by the opinion of his counsel—[The VICE-CHANCELLOR.—I do not think the counsel's opinion touches it at all.] So far from it, that opinion makes against him. He disregarded the opinion of his counsel, who dissuaded him from even cross-examination.

Neither is he protected by the passage cited from Mr. *Headlam*. Had he meant to rely upon that passage, he ought to have obtained an order to examine the Defendants, as Mr. *Headlam* states at p. 853, citing *Legh v. Williams*. Besides, he ought not to have filed a replication. He has committed a series of blunders. The interpretation of the statute has been decided in this very case of the *Attorney-General v. Dew*. [The VICE-CHANCELLOR.—The report does not state that the statute was cited.] But it must have been considered. [The VICE-CHANCELLOR.—Had he intended to rely upon the statute, could his conduct have been called *crassa negligentia*?] I submit that it could; but the fact is, that he never intended to rely upon Mr. *Headlam's* view of the statute.

[The VICE-CHANCELLOR.—Do the authorities decide the question of the amount to be disallowed; for instance, where there have been disbursements in the cause? Suppose, before the error occurred, the relators had been ordered to pay certain costs, incurred properly, and not in consequence of any error on the part of the solicitor, and the solicitor had paid those costs, would that payment be disallowed?]

All is to be disallowed—not the last brick which breaks the wall. The contract between solicitor and client is one entire contract, as is shewn by the rule as to the operation of the Statute of Limitations upon a solicitor's bill, where upon this principle time runs from the date of the last item.

Mr. *James*, Q. C., in reply, relied upon Lord *Campbell's* statement of the law in *Purves v. Landell*, as establishing that all a client has a right to expect from his solicitor is, that he will be honest and diligent.

1855.
STOKES
v.
TRUMPER.
Argument.

Then, in this case, the Court would not construe too strictly against Mr. *Pugh* what he said in his affidavit about having intended to cross-examine. All he said was, that he relied on the agreement as a sufficient authority to enable the Commissioners to put questions "by way of cross-examination." And that is the light in which the examination of an adverse witness is viewed in all cases, whether it be obtained by interrogatories in chief, or cross interrogatories.

At all events, the objection ought not to be extended to the whole bill; it would be extremely hard to confiscate moneys paid by *Pugh* to other persons on behalf of his client.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

May 25th.
Judgment.

I fully concur in what was urged in support of the present claim to this extent, that if the case were simply one in which Defendants had been called as witnesses on the part of the relators, and in which it had proved on that account impossible to obtain a decree, it would not have been a case of *crassa negligentia*. Looking to the stat. 6 & 7 Vict. c. 85, and to the opinions which have been expressed on that statute (although I do not intimate the slightest doubt in my own mind as to the interpretation to be put upon the statute, and even if it had been relied upon in the argument before Vice-Chancellor *Knight Bruce*, I think

1855.
 ———
 STOKES
 v.
 TRUMPER.
 ———
Judgment.

the great probability is that his decision would not have been different from what it was), and looking to the doubt expressed by Lord *Truro*, besides what might have been urged on the authority of *Elkington v. Holland* and *Purves v. Landell*, it would have been impossible in such a case as I have supposed to hold that there had been on the part of the solicitor such *crassa negligentia* as would disentitle him to sue.

But the foundation of the argument in the case supposed is, that the solicitor acted *bonâ fide*, and used ordinary diligence and ordinary skill, and that so acting and using such diligence and skill, he was misled, and misled simply on a doubtful point of law, into taking a step which ultimately proved ruinous to his clients. Now this case is wholly different from the case supposed ; Mr. *Pugh* has not been misled by anything of the kind. It is impossible, consistently with the facts in evidence, to hold that he had in the least considered the point of law with a view to examining the Defendants *Gowland* and *Lee-Warner* as witnesses on the part of the relators. He had taken Mr. *Wray's* opinion whether they could be examined as witnesses on the part of their co-Defendant *Dew*, and Mr. *Wray* had given his opinion that they could. Having taken that opinion, Mr. *Pugh* was attending where the witnesses were to be examined, and one of the relators suggested that it was desirable for him to examine the Defendants *Gowland* and *Lee-Warner*, in order to elicit the truth. I am putting it most favourably now for Mr. *Pugh*. I will suppose that the relators said to him, 'It is desirable to examine these witnesses, for we have had a conversation with them, and they are able to state some very important matters in our favour.' It is immaterial whether his clients said 'examine or cross-examine,' because the client is not supposed to know anything of such technicalities ; but the solicitor was, no doubt, well aware of the right course.

Having favourable witnesses produced by the other side, the right course was to cross-examine them, and that was the course he intended to take.

1855.
STOKES
v.
TRUMPER.
—
Judgment.

It was argued that cross-examination would have been open to the difficulty, that, if the examination in chief was not read, then the benefit of the supposed favourable evidence might be lost to the relators, because, the examination in chief not being read, the cross-examination could not be read either. That is true, and I should be quite willing to accede to the argument if it were consistent with the facts before me; but the fact is, that *Mr. Pugh* did think fit to cross-examine, he thought it best to do so, and throughout his affidavit he says fairly enough that such was his object. [His Honour read the affidavit to shew this.] It is true that at the close of his affidavit he says,—“I also considered that their evidence was material on behalf of the informant, as the prayer of the information against them was for their dismissal from the trusteeship of the charity; and I considered myself justified in the course I pursued from having perused the statute 6 & 7 Vict. c. 85, and *Daniell's Chancery Practice* by *Headlam*, and also from having received the opinion of our counsel *Mr. Wray*.” But it cannot be argued from that passage that he considered he was justified in examining in chief, because the whole of the affidavit shews that he intended to cross-examine, and to cross-examine only.

The opinion that *Mr. Wray* gave cannot justify the solicitor in the course he took, for *Mr. Wray*, whether correctly or not, advised him not to cross-examine, because cross-examination would give weight to the examination of the witnesses in chief on the part of their co-Defendant *Dew*, and possibly preclude the relators from objecting to their testimony on the ground of their being interested witnesses. It is impossible for *Mr. Pugh* to rely on that opin-

1855.
 ———
 STOKES
 v.
 TRUMPER.
 ———
Judgment.

ion as justifying either his examination of the witnesses in chief, or his intention to cross-examine them. And by this blunder, which really seems to be a blunder of the most gross description, instead of putting cross-interrogatories, interrogatories in chief are exhibited, and the witnesses are made witnesses in chief instead of being examined on cross-interrogatories.

It was argued that the view I take is an adherence to the letter and not to the substance. It seems to me to be the substance itself. The solicitor has taken a course which has led to the whole difficulty. He cannot say, 'It was a moot point whether by examining in chief I should or should not prevent a decree being taken against the Defendants, and it being a moot point I ought not to be liable.' Had he cross-examined, that moot point never would have arisen; there would never have been any question of a doubtful character at all; he would have had a plain straightforward case; would have got all the benefit of the examination, and no question of this kind would have arisen. He by his negligence has caused it to arise. He by his negligence has brought his clients up to a doubtful point of law which never need have arisen, and that doubtful point has proved fatal to their cause.

The fact of a solicitor by his negligence placing his client in a difficulty of this description, is that which the Court is bound to call *crassa negligentia*—the circumstance of his putting an examination in chief instead of a cross-examination is *crassa negligentia*. The terms used by *Parke, B.* in *Elkington v. Holland* (a), are these—"The solicitor has not infringed any plain rule of law or point of practice." Here the solicitor has infringed a plain point of practice, in putting in interrogatories in chief instead of cross

(a) 9 M. & W. 661.

interrogatories. In *Purves v. Landell* (a), Lord *Lyndhurst*, C., admits that where an attorney has shewn a "want of reasonable skill," he is liable in an action for negligence; and in this very case of *The Attorney-General v. Dew*, as reported by *De Gex & Smale*, the learned Judge says, "I cannot but attribute to error and want of knowledge, and to no design or intention of abandoning the case against Mr. *Gowland* or Mr. *Lee-Warner*, that they were examined, as they were, in chief in support of the information, in support of which they might have been, as Mr. *Dew's* witnesses, cross-examined" (b). The case is the same as if it had happened at law, where there can be no doubt the solicitor would have been responsible.

1855.
STOKES
v.
TRUMPER.
—
Judgment.

That is the effect here: and although one may greatly regret it as regards the position of the solicitor, still it is a case of hardship on both sides; and where the hardship must fall one way or the other, the question is, whether it ought not to fall on the party who has been guilty of negligence.

With regard to the remaining question, whether the whole, or only a part, of the bill is to be disallowed, I have examined the authorities, and I find they establish, that where, as here, a solicitor has been retained for and has undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill; and where, as here, the business in question is the prosecution of a suit, and the solicitor has by his *crassa negligentia* in the conduct of that suit caused the suit to be lost, he cannot recover any portion of his bill. I refer to the class of authorities of which one of the latest is *Whitehead v. Lord* (c), and which decide that a solicitor cannot bring his action for a bill of costs until the whole of the business is

(a) 12 Cl. & F. 107. (b) 3 De G. & S. 495, 496. (c) 7 Exch. 691.

1855.
 STOKES
 v.
 TRUMPER.
 —
Judgment.

done, except in a case where there has been a stipulation, that, until the client furnishes him with money, he cannot go on with his case. A solicitor has but one retainer—it is all one work and one business that he undertakes to carry through; and here it is in relation to that one business that Mr. *Pugh* has failed.

Mr. *James*.—There have been disbursements.

The VICE-CHANCELLOR.—If there are any particular items, they had better be stated in Chambers. I am afraid you will find that the principle will apply to all.

Mr. *Rolt*.—The disbursements in the suit will follow the decision.

July 2nd. By the certificate of the Chief Clerk, the whole of the claim, with the exception of a sum of 5*l.* 17*s.* 6*d.*, was disallowed.

July 24th. Mr. *Pugh* appealed, but the question was not re-argued. Upon the matter being opened before the Lords Justices, the claim, by the consent of the respondent, was settled at 375*l.*

1856.

IN RE THE STAT. 10TH & 11TH VICT. C. 96,

Jan. 26th.

AND

IN RE CAZNEAU'S LEGACY UNDER HOUSMAN'S
WILL.

ON the 14th of December, 1855, *Spry* and *Tull*, executors of the will of *Catherine Housman*, who died in February, 1855, paid into court under the Trustee Relief Act (10 & 11 Vict. c. 96), 1693*l.* 14*s.* 9*d.* Consols, and 25*l.* 14*s.* 4*d.* cash, bequeathed by the testatrix to *Cazneau*.

Practice—10 & 11 Vict. c. 96—4th Order of 10th June, 1848—Trustee—Petition—Costs.

On the 7th of January, 1856, *Spry* and *Tull* applied by petition under the 4th Order of the 10th of June, 1848, for a distribution of the fund.

On the 14th of January, 1856, a petition for the distribution of the same fund was presented by *Lister* and *Morgan*, the official assignees, under a fiat in bankruptcy, awarded and issued against *Cazneau* in 1837.

The fund was also claimed by mortgagees under an indenture of assignment executed by *Cazneau* in November, 1855.

Where trustees, having paid money into court under the Trustee Relief Act (10 & 11 Vict. c. 96), afterwards apply by petition under the 4th Order of the 10th of June, 1848, for a distribution of the fund, the Court has jurisdiction to make an order upon the petition, and is bound to exercise that jurisdiction.

Mr. *Daniel*, Q. C., for the executors.

Mr. *Rolt*, Q. C., and Mr. *Eddis*, for *Lister* and *Morgan*, asked to have the petition of the executors dismissed, with costs.

But where such a petition was presented by trustees without consent of the parties claiming beneficial interests in the fund, and no cause was shewn by the trustees for taking upon themselves to

We contend, in the first place, that trustees are not entitled to present a petition for the distribution of a fund

be the movers in the matter, the Court, to discourage such applications, allowed them only respondents' costs.

1856.

In re
CASNEAU'S
LEGACY,
UNDER HOU-
MAN'S WILL.

Argument.

which they have themselves paid into court. It is an abuse of the Act. The object of the Act was, the relief of trustees. That object is attained when the trustees pay the trust fund into court. By the fact of payment, their liability ceases. It is no part of their business to see to the distribution of the fund. If trustees are entitled to petition for the distribution of a fund, they may do so the instant after they have paid it into court. [The VICE-CHANCELLOR.—*In re Cooper's Trust*, I made an order upon a petition presented by trustees for the distribution of a fund which had been paid into court under the Act, and the Lords Justices affirmed my order. It is true that in that case all the parties interested were desirous that the petition should be so presented: but if your contention upon the first point is right, that order was wrong; for your argument would prove that the Court has no jurisdiction to adjudicate upon a petition so presented.] But admitting, that in a proper case, and where all the parties interested desire it, the Court has jurisdiction to adjudicate upon a petition thus presented, we contend, secondly, that this is not a proper case for the exercise of that jurisdiction; and that in this case the petition of the executors should be dismissed, with costs. Here there has been nothing to justify such an application. There was no delay on the part of those entitled to the fund, whose claims were of an intricate nature, requiring time to prepare them for the hearing. For this not a month is allowed them by the executors, whose object has been simply to run a race with their *cestuis que trustent*, to see which could first present a petition. [The VICE-CHANCELLOR.—If they were wrong in thus presenting a petition, was it the right way, to remedy that impropriety, for you to file a counter petition?] Their petition was answered on the 7th of January—ours on the 14th; and on the 11th we informed them that we had instructed counsel to prepare a petition.

Mr. Cairns, for the mortgagees.

The VICE-CHANCELLOR.—I am clearly of opinion that I have jurisdiction to make an order upon a petition thus presented, and I am bound to exercise that jurisdiction. But, as to costs, it is a very different matter; and upon this, I must hear a reply.

1856.
In re
CAZNEAU'S
LEGACY,
UNDER HOU-
MAN'S WILL.
—
Argument.

Mr. *Daniel*, Q. C., in reply.—If the trustees were entitled to present a petition, if the Court can adjudicate upon the petition they have presented, and if they have not involved the other parties in any greater expense than they would otherwise have incurred, why are they not to have their costs? Here the petition was contained in three brief sheets, and was served only upon the parties interested.

The conduct of *Lister* and *Morgan*, in presenting a counter petition, after they had notice of the petition of the trustees, is utterly indefensible.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

It is quite clear to me that I have jurisdiction to adjudicate upon a petition thus presented by trustees for the distribution of a fund which they have paid into court. It was at first doubted whether any relief could be given to respondents on a petition presented by a party in a different interest, but such jurisdiction was first exercised by Lord *Cottenham*, C., in *Gaffee's Trust*(a); and afterwards I took upon myself *In re Cooper's Trust*, where all the parties wished the petition to be so presented, to make an order upon a petition presented by trustees for the distribution of a fund paid into court; and my order was affirmed by the Lords Justices without any objection upon the point of jurisdiction.

The main question is as to the propriety of the trustees' conduct in taking upon themselves to present such a peti-

(a) 1 M. & G. 541.

1856.

In re
CARNEAU'S
 LEGACY,
 UNDER HOUSS-
 MAN'S WILL.

—
Judgment.

tion; and I believe this is the first instance in which that question has arisen—the first instance in which trustees have taken upon themselves, without the consent of the parties claiming to be beneficially interested in the fund, to present a petition for its distribution.

What has been the conduct of these trustees? By the payment of the fund into court, they had secured to themselves all the indemnity to which they could possibly be entitled. Everything which they had the slightest interest in seeing done, was done. They were indemnified in toto. What right had they, after that, to affect the fund in respect of costs—to take upon themselves to be the movers in a matter in which other parties were very materially interested, but in which they had no interest whatever?

If a trustee, having occasion to deal with another fund the distribution of which is dependent upon the manner in which the fund he has paid into court may eventually be distributed, should find that fund allowed to remain undistributed, and the whole question allowed to be hung up indefinitely, it would be a different matter. But, in such a case, what is the duty of the trustee? Clearly not at this short notice to apply for its distribution; but to communicate with the parties claiming to be beneficially interested, and ascertain from them whether they are not going to take some steps to bring the matter to a conclusion.

It was impossible for these trustees to imagine, that, where so large a sum as the present was at stake, no step would be taken by the claimants.

I hope it will be a sufficient discouragement to such conduct as the present on the part of trustees, if I give them in this matter only such costs as they would have had if served with a proper petition.

[The Court eventually made one order upon both petitions, and gave the executors respondents' costs on both.]

1856.

IN RE THE JOINT STOCK COMPANIES WINDING-
UP ACTS, 1848 AND 1849;

AND

THE GREAT CAMBRIAN MINING AND
QUARRYING COMPANY:

HAWKINS' CASE.

IN 1853 the company was projected, and a prospectus issued, which was headed thus:—

“The Great Cambrian Mining and Quarrying Company.
In 30,000 shares of 1*l.* each, to be paid upon allotment.

“To be conducted upon the cost-book principle, and the accounts audited every two months. No deed to be signed.”

At a meeting held on the 15th of September, 1853, it was resolved, that the adventure should be conducted on the cost-book principle, under the following amongst other rules:—

1. That the adventure should be divided into 30,000

soon as one-third of the shares should have been subscribed; and by another that no person should be recognised as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and be duly registered in the cost-book as an adventurer. *W. H.* having seen the prospectus, but not the rules, applied verbally and paid for and received certificates of shares in the company. The certificates stated that the shares were to be held subject to the rules of the company. The company failed. *W. H.*, a year after he received the certificates, brought an action to recover his money, and the action was compromised.

Held, 1stly:—That the certificates were notice of the rules; and although *W. H.*, assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable locus penitentis to return the certificates, still, having retained them, and not having brought his action for a year, he must be taken to have acquiesced in and be bound by the rules.

2ndly. That although *W. H.* had not signed the rules, still, having applied and paid for and accepted the certificates of shares, he had authorised the company to register his name in the cost-book without his signing the rules; the contract was complete, and he was a “contributory.”

Cost-book Principle.

Rules peculiar to the cost-book system must be proved.

Jan. 18th.

Joint Stock Companies Winding-up Acts, 1848, 1849—Contributory—Notice—Acquiescence—Laches—Signature of Rules.

A mining company by its prospectus and certificates professed to be a company in 30,000 shares of 1*l.* each, to be conducted upon the cost-book principle. The Directors passed rules, by one of which the company was to be considered as constituted, and the directors to be at liberty to commence business, so

1856.
 In re
 THE GREAT
 CAMBRIAN
 MINING AND
 QUARRYING
 COMPANY;
 HAWKINS'
 CASE.

—
Statement.

parts or shares, numbered in regular order from 1 to 30,000; and upon each of which 1*l.* should be paid at the time of issuing the same.

2. That the several persons who should subscribe for any of the shares should, upon signing the rules, be respectively entitled to a certificate or certificates, under the hands of three of the directors of the adventure, of his being the proprietor of the shares in the adventure for which he should have subscribed and signed the rules.

4. That when and as soon as one third part of the 30,000 shares should have been subscribed, the adventurers should be and continue associated for the purposes of the adventure, and the directors should have full power to do all acts and things authorised by the rules and regulations in the same manner as if the whole of the 30,000 parts or shares were actually subscribed for.

37th. That no person should be recognised as an adventurer in the company, or entitled to any benefit therefrom, until he should have signed the rules of the company, and be duly registered in the cost-book as an adventurer.

In 1854, *Hawkins* having seen the prospectus, but not the rules of the company, applied verbally, through the solicitor of the company, for 550 shares, for which he paid the requisite amount, and received certificates in the following form:

"2061.

"The Great Cambrian Mining and Quarrying Company.

"In 30,000 parts or shares of 1*l.* each. To be conducted on the cost-book principle.

"No. 10,301 to 10,305.

"Five ."

"This is to certify that the holder of this certificate is the proprietor of five parts or shares in the Cambrian Mining and Quarrying Company, to be held subject to the rules of the company, upon each of which the sum of 1*l*. has been paid.

"London, the 10th day of December, 1853."

[Then followed signatures, and a reference to the corresponding entries in the company's books.]

The scheme proved a failure, and, in consequence of the debts and liabilities of the company, a call of 2*s*. 6*d*. per share was made upon the shareholders.

Subsequently, in April, 1855, and just a year after receiving the certificates, *Hawkins* brought an action against three of the directors of the company, to recover back the money he had paid for them, laying his damages at 1000*l*. The Defendants pleaded "never indebted." Issue was joined, and the cause set down for hearing. Shortly before the day appointed for the hearing, the Defendants proposed terms for settlement, and an order to stay all further proceedings was agreed upon, on payment of all costs and 150*l*. damages.

An order was subsequently obtained for winding up the company. An official manager was appointed, and *Hawkins* was served with notice that the official manager would seek to put him on the list of contributories.

Hawkins had not signed the rules or any other document of the company, but his name was registered in the cost-book. He had never acted in the management or attended any meeting of the company. He had not paid the call of 2*s*. 6*d*., or noticed the letters apprising him that such call was made.

1856.
In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS'
CASE.
Statement.

1856.

In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS'
CASE.

Argument.

The Chief Clerk, after hearing the evidence, decided that *Hawkins* should be included in the list of contributories for 550 shares.

Mr. *Rolt*, Q. C., and Mr. *Surridge* now moved that the decision of the Chief Clerk might be reversed, and to have *Hawkins's* name struck out from the list.

Mr. *Hawkins* is not a contributory within the meaning of the Acts. To constitute a contributory, it is requisite that the party should be, as between himself and the general body of adventurers, a partner, or that he should have done some act holding himself out to the world at large as a co-adventurer. According to Lord *Truro*, C., "He must either be liable to creditors, or he must be liable to contribute to the indemnity of those persons who were liable to the creditors of the projected company" (a). "The Winding-up Acts in no respect altered the legal rights or liabilities of any one. Those who had incurred liabilities remained liable. Those who had acquired rights retained those rights. It was not the object of the Acts to add to or to detract from any existing right" (b). These are the principles by which this case must be tested; and, tested by these principles, *Hawkins* is not liable as a contributory.

It will be said that he applied for shares in the company, and that shares in the company were allotted to him, and he received the certificates. But there is a fallacy in this statement. He applied for shares in a company with a capital of 30,000*l.* The shares allotted to him were shares in a company with a capital, in effect, of but 10,000*l.* So far as he is concerned the company in which he applied to

(a) Per Lord *Truro*, C., in *Besley's case*, 3 M'N. & G. 302. in *Carrick's case*, 1 Sim. N. S. 509; *Hutton v. Thompson*, 3 H.

(b) Per Lord *Cranworth*, V. C., L. Cas. 161.

become a shareholder was never formed. The stipulation that the capital should not be less than 30,000*l.* was of the essence of the undertaking, and was viewed as such by *Hawkins*, as it would be by any other mercantile person. And if behind his back, without his knowledge, without any attempt to give him notice of the change, the directors pass rules cutting down that capital by two thirds, he is entitled to say, 'That is not the undertaking in which I applied for shares.' [The VICE-CHANCELLOR.—The rules were in existence at the time when *Hawkins* applied for his shares.]

1856.
In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS'
CASE.
—
Argument.

Admitting that to be the case, he had no notice of such a change as this. The words in the certificate "subject to the rules of the company," cannot be deemed such notice. Those certificates bore upon their face that the company was to be "in 30,000 parts or shares, of 1*l.* each." Any rules to which after that the certificate might refer, must be deemed to have been rules relative to a company with a capital of 30,000*l.*, rules as to subordinate details; otherwise the certificate was a snare by which *Hawkins* was enticed into the company. The directors might as well have made rules altering the business of the company from mining in *Wales* to fisheries in the *South Seas*.

But, if *Hawkins* is to be deemed to have had constructive notice of the rules in question, he had notice of them all, and, therefore, of the 37th rule, which provides, "that no person should be recognised as an adventurer in the company, or entitled to any benefit therefrom, until he or she shall have signed the rules of the company, and be duly registered in the cost-book as an adventurer." Now, *Hawkins* never signed the rules. He never accepted the shares. So far from it, as soon as possible after discovering the error into which he had been betrayed by the prospectus, he repudiated the allotment, bringing his action to recover back

1856.
In re
 THE GREAT
 CAMBRIAN
 MINING AND
 QUARRYING
 COMPANY;
 HAWKINS'
 CASE.

Argument.

the money he had paid upon the faith of the prospectus, and retaining the shares merely with a view to that action. This is a sufficient answer to the pretence that there has been acquiescence on his part.

It will be said that special rules are applicable to the present company, as being a company upon the cost-book principle. But, independently of other answers to this objection, it is not the fact that this is such a company. Certainly it is not a company upon the cost-book principle, as defined by *Collyer*, *Wordsworth*, or any other writer of authority. It is simply a joint stock company, which, by putting forward the pretence of the cost-book system, has contrived to violate the law requiring registration.

Mr. *Daniel*, Q. C., and Mr. *Roxburgh*, for the official manager.

Hawkins has been properly placed upon the list of contributories. He applied for shares. He paid for them. He received and accepted the certificates, and on each of those certificates it was declared that he held subject to rules, by one of which it was provided, that when and as soon as one third part of the 30,000 parts or shares should have been subscribed, the adventurers should be and continue associated for the purposes of the adventure or company, and the directors should have full power to do all acts and things authorised by the rules, in the same manner as if the whole of the 30,000 parts or shares were actually subscribed for.

It is well settled, that where a party has applied for shares, and has received and accepted certificates, he is a contributory, although he may not have signed the deed of settlement, or, as here, the rules and regulations of the company. In *Clements v. Todd* (a), the allottee had never

(a) 5 *Railway Cases*, 132.

signed either the parliamentary contract, or the subscribers' agreement, and had never received a letter of allotment; yet, having applied for shares and received certificates, he was held to have put himself in the same position as if he had signed both. So, in *Ex parte the Earl of Mansfield* (a), an allottee was held to be a contributory, although he had neither signed the deed, nor paid any call, nor taken any part in the company's affairs. And *Ex parte Yelland* (b) meets still more closely the objection founded on the 37th rule of this company. In that case the deed of settlement provided, that, immediately upon its execution, the person executing it should be entered on the registry and returned to the Joint Stock Registry Office under the provisions of the Registration Act, and should *thenceforth, but not before*, assume the liabilities and privileges of a shareholder; yet it was held, that, inasmuch as the party had agreed to take shares, and had accepted them, he had authorised the company to put his name on the register without his execution of the deed.

The objection founded on the 4th rule of this company is met by the same case of *Ex parte the Earl of Mansfield*, for there the contract was held to be complete notwithstanding the company commenced operations before its capital was fully subscribed:—which is all that can be objected to the present company.

And as to *Hawkins* having been misled by the prospectus, that objection is met by *Parbury's case* (c), where the prospectus contained incorrect and even fraudulent statements, in reliance upon which the allottee applied for shares in a company which proved abortive, yet the allottee was held a contributory.

1856.

In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS
CASE.

Argument.

(a) 2 M'N. & G. 57.

appeal, 16 Jur. 509.

(b) 5 De G. & S. 395; *S. C.* on

(c) 3 De G. & S. 43.

1856.
 In re
 THE GREAT
 CAMBRIAN
 MINING AND
 QUARRYING
 COMPANY;
 HAWKINS'
 CASE.

Argument.

They relied also on rules specially applicable to companies on the cost-book principle

Mr. Rolt, Q. C., in reply.

All the cases cited are distinguishable from the present.

In *Clements v. Todd* there was an express agreement to sign. The Plaintiff applied for shares by a formal letter of application, and that letter contained a formal undertaking to sign both the parliamentary contract and the subscribers' agreement. Here there has been no such undertaking. In that case, too, there was acquiescence. More than reasonable time elapsed before the Plaintiff brought his action to recover his deposit. Here *Hawkins* brought his action in April, 1855, as early as possible after discovering his error and not twelve months after he applied for the shares.

In *Yelland's case* it was notorious that the company had been re-constituted and re-registered twelve months before *Yelland* applied for shares, and he clearly had notice of those facts. In that case also the allottee had been actually entered on the registry of shareholders, although he had not signed the deed of settlement: the subsequent and material step had been taken, although the intermediate step had not.

In Lord *Mansfield's case* the allottee was registered as a shareholder; and registering under the Joint Stock Company's Registration Acts is tantamount to signing rules like the present. Again, in that case there had not been any attempt to reduce the shares. It was simply that the company had never been completed up to the full amount of shares.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It appears to me that this case is concluded by the authorities which have been cited: and, if I may venture to say so, those authorities are founded upon principle.

I will assume, for the purposes of this discussion, that Mr. *Hawkins* applied for the shares, which have been allotted to him, simply upon the faith of what appeared in the prospectus, and without notice of any rule not appearing, or mentioned, in the prospectus.

Now, assuming this to have been the case, I cannot but observe in limine, that in the rule of which Mr. *Hawkins* complains, as having altered the very nature of the company, by reducing the amount of capital of the undertaking, there is nothing inconsistent with the prospectus. The rule in question does not provide that the capital of the undertaking shall be limited to 10,000*l*. All it provides is, that, "as soon as 10,000 parts or shares shall have been subscribed, the adventurers shall be and continue associated for the purposes of the adventure," and in effect, the directors shall be at liberty to commence business. That is not inconsistent with the prospectus. There is nothing in the prospectus to prevent the directors from commencing business before the whole 30,000 should have been subscribed. There is nothing in the rule in question to prevent the directors from going on allotting shares to the full number of 30,000. That rule does not say that the whole 30,000 shall not be subscribed. It only enables them to begin business as soon as 10,000 shall have been subscribed. And in this there does not seem to me to be anything inconsistent with the prospectus.

The prospectus, however, being issued, in September, 1853, the rules are passed. By the 1st rule, the adventure is still to be divided into 30,000 parts, upon each of which 1*l*. is to be paid. By the 2nd rule, the subscribers on

1856.

In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS'
CASE.

—
Judgment.

1856.

In re
**THE GREAT
 CAMBRIAN
 MINING AND
 QUARRYING
 COMPANY;
 HAWKINS'
 CASE.**

—
Judgment.

signing the rules are to be entitled to certificates. By the 4th rule, on which I have already commented, as soon as one-third of the 30,000 shares shall have been subscribed the adventurers are to be and continue associated for the purposes of the adventure, and the directors are to have "full power to do all acts or things authorised by the rules and regulations, in the same manner as if the 30,000 parts were actually subscribed for,"—in other words, the company is then to be treated as constituted. And the 37th rule provides, "that no person shall be recognised as an adventurer in the company or entitled to any benefit therefrom, until he or she shall have signed the rules of the company and be duly registered in the cost-book of the company as an adventurer." That is, he will not be dealt with by the adventurers of the company as a co-adventurer having the rights of an adventurer in the company; he will get no dividend.

After the rules are passed, *Hawkins* applies for 550 shares, and gets certificates in this form. [His Honour read the form of the heading of the certificates as set out above.] He is again told by the certificates that the capital is to be 30,000*l.*; but he is also told that the shares are "to be held subject to the rules of the company." That included rules then already made, as well as rules thereafter to be made, and cast upon him the onus of ascertaining whether any rules had then already been made. If any had so been made, I think the words of the certificates were clearly sufficient to give him notice of them. It then became his business to ascertain what the rules were. Had he done this, and, considering the rules to be such as he would not consent to be bound by, returned his certificates, he would have been allowed perhaps a reasonable locus pœnitentiæ. But, instead of taking that course, he allows a year to elapse before bringing his action, and never returns his certificates. Under these circumstances, I am of opinion, that, whatever the rules might be, Mr. *Hawkins* must be taken to have acquiesced in, and to be bound by them.

Then as to the circumstance of Mr. *Hawkins* not having signed the rules as mentioned in the 37th rule, assuming (what ought, however, to have been proved, and must still be proved in Chambers) that the 10,000 shares have been subscribed and the company constituted, it appears to me that this case falls within *Yelland's case* and *Lord Mansfield's case*. As in *Yelland's case*, the party "has agreed to take shares, and has accepted them." He has, therefore, "authorised the company to register his name" in the cost-book "without his signing the rules" (a). As in *Lord Mansfield's case*, there is "an agreement that on paying his money he is to receive certain certificates, entitling him to a share in the profits to be realised by the company—a stipulation that he is to receive all benefits arising from the possession of that scrip." Here, therefore, as in that case, "the party having paid the deposit money, the contract was complete" (b). And the Joint Stock Companies Winding-up Act has said, that all members who so accept shares are liable to contribute (c).

I am, therefore, of opinion, that Mr. *Hawkins* has properly been placed upon the list of contributories.

I decide this question without taking notice of any rule peculiar to companies formed upon the cost-book principle. Such rules may be well-known in the Stannary Court of *Cornwall*, but not here; and (d) where it is intended to place reliance upon rules peculiar to that system, such rules must be proved.

(a) Per Sir *James Parker*, V. C., M'N. & G. 66.

in *Ex parte Yelland*, 5 De G. & S. (c) Id.

399. (d) See *In Re Fenn*, 4 De G.,

(b) Per Lord *Cottenham*, C., 2 M'N., & G. 295.

1856.

In re
THE GREAT
CAMBRIAN
MINING AND
QUARRYING
COMPANY;
HAWKINS'
CASE.

Judgment.

1855.

Dec. 14th,
15th, & 19th.

*Injunction—
Contract—
Breach of—
Damages—
Action—
Water.*

Where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant

affords sufficient ground for the Court to interfere by injunction.

And, *semble*, the Court may so interfere, whether the breach has or has not been actually committed, provided the Defendant claims and insists on a right to do the act which would constitute such breach.

Defendants demised to Plaintiff a plot of land, one-half of an adjoining brook, a cotton mill, reservoir, and steam-engine of 100-horse power on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually supplying with water and working the said steam-engine, or any other steam-engine of like power and capacity;" and covenanted not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the demised premises according to the tenor of the demise. Shortly afterwards the Defendants erected, a little below the bridge but above the plaintiff's mill, a new cotton mill and steam-engine, with a reservoir, which drew off water from the brook between the Plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water, which the Plaintiff had to use for condensing his engine, from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes. It was also deposed that on another occasion, in consequence of the increased temperature, the Plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute.

Upon motion for a decree, the Court granted a perpetual injunction, restraining the Defendants from discharging heated water, so as to increase the temperature of the water which the Plaintiff used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, shewed a material interference with the quality of the water to which the Plaintiff was entitled under the demise; and that the question whether such interference was such as to give him a right to damages was one which he was not obliged to try.

But so much of the motion as sought to restrain the Defendants from diverting the water for their new mill, was directed to stand over, upon terms of the Plaintiff bringing an action; the Plaintiff having failed to shew that he had ever yet been deprived by the Defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared from the evidence that he had great reason to fear that he would be so deprived.

TIPPING v. ECKERSLEY.

BY an indenture, dated August, 1853, the Defendants demised to the Plaintiff, for a term of twenty-one years, a plot of land in *Poolstock*, in *Wigan*, one half of so much of a brook called *Poolstock Brook* as adjoined the plot of land, a cotton mill and reservoir standing upon the plot of land, and a steam engine of 100 horses power then erected upon the premises; together also with the free use and enjoyment during the term of a certain weir or dam then recently made on the brook, for the purpose of holding up the water of the brook from the point where the weir was then

erected to the level of the bed of the brook at *Poolstock Bridge*, situate above the cotton mill, and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually supplying with water and working the said steam engine, or any other steam engine or steam engines to be thereafter during the term erected upon the premises of the like power and capacity. And the Defendants covenanted with the Plaintiff to pay half the expenses of maintaining and repairing the weir; and that the Defendants, their heirs and assigns, would not construct or permit any other weir or dam upon or across the brook, between the said weir and *Poolstock Bridge*. The indenture also contained an absolute covenant by the Defendants, in the usual form, for quiet enjoyment by the Plaintiff of all the demised premises according to the tenor of the demise.

1855.
TIPPING
v.
ECKHART.
Statement.

In April, 1854, the Defendants erected, a little below the bridge, but above the Plaintiff's mill, a new cotton mill, with a steam engine and machinery; and near the new mill, and communicating with the brook at a point above the Plaintiff's point of communication, they constructed a new reservoir of the superficial area of 750 square yards, the bottom of which was about twenty-four inches lower than the level of the bed of the brook. Shortly after the new mill commenced working, the Defendants, to increase the quantity of water above the weir, placed upon the weir a cap, which raised it about nine inches above its original height. A dispute then arose as to the Defendant's right to place the cap upon the weir; the cap was removed by the Plaintiff; and, on the day after its removal, the Defendants, who had previously endeavoured without success to supply the Plaintiff with additional water from another source, commenced discharging the heated water, which they had used for their new mill, into the brook, at a point a few feet below the new reservoir, but above the point at which the

1855.
TIPPING
v.
ECKERSLEY.
—
Statement.

Plaintiff's reservoir communicated with the brook, so that all such heated water became mixed with the water applicable for the use of the Plaintiff's steam engine. Previously to the removal of the cap the Defendants were in the habit of discharging their heated water into the brook at a point below the weir.

The bill prayed that the Defendants might be restrained from discharging or returning into the brook at any point above the weir any heated water, or water previously used for the purposes of their new mill, and from diverting or using for the purposes of working their new mill, steam engine, or otherwise, any part of the water of the brook so as to impede, prejudice, or affect the free use and enjoyment at all times by the Plaintiff in preference and priority to every other person of a sufficient quantity of such water, for the effectual supplying and working of the Plaintiff's steam engine; and, that the Defendants might also be restrained from permitting the bottom of the new reservoir to remain at its then level, or at any level lower than that of the bed of the brook.

It did not appear from the evidence that the Plaintiff's right to so much of the stream, as was necessary for effectually supplying with water and working the steam engine, comprised in the lease, in the state in which it was demised to the Plaintiff, had yet been actually interfered with,—although there was great reason to fear that such right would be interfered with—by the course adopted by the Defendants.

In regard to the heated water, it appeared by the evidence of the Defendants' witnesses, that, upon one occasion, at 6 o'clock in the evening, the natural temperature of the water of the river being 57°, the water at the weir, after the heated water had been poured in, was 70°, and the water in

the Plaintiff's jackwell (the receptacle for the water which it was necessary for him to use for the purpose of condensing his engine) 68°, shewing that the Defendants by their operations had raised the water in the Plaintiff's jackwell 11°. With respect to water below 42° in temperature, there was a slight difference of opinion among the scientific witnesses as to what is the best temperature for condensing purposes, one saying 32°, another 41°. But it appeared by the evidence of the Defendants' witnesses, that every additional degree of heat above 41° has the effect of rendering water less fit for condensing purposes.

1855.
TIPPING
v.
ECKERSLEY.
Statement.

As to actual damage, one of the Plaintiff's witnesses deposed, that, on another occasion, in consequence of the increased temperature in the Plaintiff's jackwell, the Plaintiff's engine worked "*nearly* half a stroke per minute less" than the usual rate of twenty-eight strokes per minute.

Mr. Rolt, Q. C., and Mr. Eddis, now moved for a decree as prayed by the bill.

Argument.

This being a case of contract, the sole question was, whether there had been a breach. If there had, it was immaterial whether a Court of law would or would not give more than nominal damages. A case in which the Plaintiff would get merely nominal damages, was a case for an injunction: *Rochdale Canal Company v. King* (a), *Attorney-General v. The Sheffield Gas Consumers Company* (b). Here the contract was in effect, that the Plaintiff should have a prior right to the use of the water of the stream, in preference and priority to every other person; and of that prior right the Defendants had deprived him.

(a) 2 Sim. N. S. 78.

(b) 3 De G., M'N., & G. 304.

1855.

TIPPING

v.

ECKERSLEY.

Argument.

Mr. *James*, Q. C., and Mr. *Cairns*, for the Defendants.

The bill should be dismissed, or, at all events, the Court will put the Plaintiff upon terms of bringing an action.

The Plaintiff is entitled to what the lease gives him, and to nothing more. All the lease gives him, in respect of quantity, is the use of so much of the stream as is necessary for his steam-engine. To that he has a prior right. To more than that it is idle to say he has a prior or any right. The Defendant might put 100 mills above the Plaintiff's mill, and might so work those mills as to give rise every night to serious apprehension, that on the following morning the Plaintiff would not have water sufficient for his engine; but until the Plaintiff is deprived of water sufficient for his engine, the contract is not broken, and the Court cannot interfere. Thus interpreted, the contract has not been broken.

Then, as to the quality of the water, all the lease gave the Plaintiff was such use of the stream which usually flowed as was necessary for his steam-engine. All the Defendants contracted was not to prevent his effectually working his engine. Of such a contract (unlike a contract not to exercise a trade) to shew breach, the Plaintiff must shew damage.

The VICE-CHANCELLOR.—Suppose these were dyeing mills, and some (whether a prejudicial amount or not) of the dyeing material reached the Plaintiff's mill, would it be necessary for him, under a demise like the present, to shew actual damage? Would it not be sufficient if he deposed that he believed it would prove prejudicial? The Defendants have demised the free use and enjoyment, not merely of so much water, but of so much "of the stream of water which usually flows down the brook." Does not that mean the water in its natural state?

Mr. *Cuirns*.—That, at the highest, does but place the Plaintiff in the position of an ordinary riparian proprietor, every riparian proprietor having a right to the free use and enjoyment of the stream in its natural state. In the case put by the Court, the owner of the lower dyeing mill would have to shew actual damage—not possibly in a gross instance, e. g., where large quantities of rank poison were mixed with a small stream just above his mill, but at least where, as here, it is a question of extreme nicety, and witnesses of the highest scientific character differ as to the effects produced. In such a case damage ought to be proved, and that by proof of what effects were produced inside the mill. Here the Plaintiff has adduced no evidence except as to what effects would follow, if water were used of a temperature to which this stream, at the point where it reaches the Plaintiff, has never been and will never be heated: and as to what is the best temperature, there is a conflict of testimony.

1855.
TIPPING
v.
ECKERSLEY.
—
Argument.

Mr. *Eddis* in reply.

In regard to the question of quantity, the covenants, first to keep up the weir below the Plaintiff's mill, and secondly, never to erect any other weir or dam above that mill, amount, in effect, to a covenant that there shall always be a certain pool or storage, of which nothing shall ever interfere with the Plaintiff's prior right of user, and that right has been as effectually violated by the new mill as it would have been by a second weir or dam.

As to the question of heated water, if the Plaintiff has omitted to prove that the temperature of the water in his jackwell has been increased by reason of the course adopted by the Defendants, the Defendants have supplied that omission. And the Plaintiff's witnesses have deposed to actual damage inside the mill, in consequence of the increased temperature.

1855.
 TIPPING
 v.
 ECKERSLEY.
 ———
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

There are two distinct branches to this case. The indenture of demise containing a covenant for quiet enjoyment according to the tenor of the demise, the first question is, what is the effect of that instrument with reference to the quantity of water to be supplied by the Defendants to the Plaintiff? The second question is, whether, under the terms of the instrument, the Defendants were at liberty to interfere in any way whatever with the quality of the water to be so supplied?

Upon either branch of the case, if the construction of the instrument be clear and the breach clear, then it is not a question of damage, but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction. And I apprehend the Court may so interfere whether the Defendant has or has not actually committed the breach, in respect of which the interference of the Court is sought. For, in a case of contract, it is enough if the Defendant claims and insists on a right to do the act, although he has not already done it, *modo et formâ*, as alleged. In such a case I should have no difficulty in granting an injunction.

With regard to the first branch, the quantity of the supply, I do not think it by any means clear that the construction for which the Plaintiff contends is the right construction of the demise, or that the Plaintiff has a right, under that instrument, to what he calls the prior use of the water. What he has a clear right to is, the free use and enjoyment of so much of the stream as is necessary for effectually supplying with water and working the steam engine mentioned in the demise. But if he gets this, he has no cause to complain.

It was argued in the reply, that, there being a demise of

half the brook, and a covenant on the part of the Defendants to keep up one weir, and not to erect any other weir on the brook, there is, in effect, a covenant by way of implication, that the usual flow of the river shall not be interfered with, but there shall always be a certain pool or storage, of which there shall never be anything to interfere with the Plaintiff's prior right of user; and that the Defendants, by drawing off water above the Plaintiff's mill, interfered as effectually with his rights under the lease, as they would have done by erecting a second weir. The usual flow of so much of the river as is necessary for the Plaintiff's use, I admit, is not to be interfered with; and, inasmuch as the erection of a second weir, in the manner supposed, might produce such an interference, the Defendants would, even in the absence of the negative covenant, have been precluded from erecting it. But that negative covenant, at the utmost, amounts only to this, that the Defendants will not put up anything which shall intercept the usual flow of so much of the stream as is necessary for the Plaintiff's steam engine. It is far from being a covenant not to draw off what may not be necessary for that purpose. And all that the Defendants contend under this branch of the case is, that, if they allow so much of the stream according to its usual flow to reach the Plaintiff as will give him all they covenanted to give him, they are at liberty under the demise to draw off what is wanted for their own purposes.

Without determining the question of construction upon this branch of the case, it is sufficient that I think it far from clear that the Plaintiff's construction is the correct one. I do not even entertain such a doubt in favour of the Plaintiff's construction as might lead me to desire to call in the assistance of a common law Judge. On this branch of the case the Plaintiff must rest on what I conceive will ultimately prove to be the true construction of the instru-

1855.
 TIPPING
 v.
 ECKERSLEY.
 Judgment.

ment, viz. that he is entitled to so much of the stream as will effectually work his engine, and to no more.

[His Honour then, after examining the evidence upon the first branch of the case, stated as his conclusion, that, although the Plaintiff had reason, and he thought great reason, to fear that his right to so much of the stream as would effectually work his engine, would be interfered with by reason of the course adopted by the Defendants, still it was not shewn that such right had ever yet been actually interfered with. On that part of the case, therefore, he was satisfied he ought to do nothing before the action was tried.]

The second branch of the case is of a different complexion. The day after the cap was removed, the Defendants, who had previously attempted in vain to get a supply of water from another quarter,—shewing a feeling on their part that it was somewhat of a measuring cast what quantity of water would be stored up in dry seasons—finding that difficulties would be raised as to their right to replace the cap on the weir, adopted a course which up to that time they had not taken, and which from their own proceedings it is evident they had not thought it right, morally speaking, to take:—To meet a possible deficiency in the supply, they discharged into the river above the weir, but below their own reservoir, the heated water which they had used for their own mill. And the question is, whether, according to the true construction of the demise, the Defendants had a right thus to deal with the water of the river.

The demise was of (inter alia) “the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the land thereby demised, as should be necessary for effectually supplying with water and working the said steam engine.” The quantity demised is defined by the words “so much as should be necessary

for effectually supplying with water and working the said steam engine." But the words "*the stream of water which usually flowed down the brook,*" define a specific thing, and the demise is a demise of the free use and enjoyment of so much of that specific thing—of that identical stream which usually flowed down the brook. The Defendants are the owners of the whole of the stream of water in its natural state. They demise the free use and enjoyment of so much of that stream in its natural state as it usually flowed, to the Plaintiff. Have they a right afterwards to interfere with that natural state?

1855.
TIPPING
v.
ECKERSLEY.
—
Judgment.

It was argued for the Defendants that the words in question, giving them their fullest effect, do but place the Plaintiff in the position of an ordinary riparian proprietor, every riparian proprietor having a right to the free use and enjoyment of so much as he requires of the stream in its natural state. But in a case like the present, where a party, being the sole owner of the stream, says, 'I give you so much of this actual stream as it is now flowing down,' I cannot agree that the rights of the donee as against the donor are to be restricted to those of a common riparian proprietor.

It was admitted—and it could scarcely be otherwise—that had the deed contained a covenant on the part of the Defendants not to pour hot water into the brook, the question of the degree of heat would have been immaterial, the question of damages would have been one not necessary to be tried, and the Court would restrain at once. The question is, whether this covenant is not identical;—whether, if I demise a given portion of a given thing, and covenant for the free use and enjoyment of it, in the state in which it exists at the time of the demise, I do not covenant, in effect, that I will not interfere or intermeddle in any way with the state of that thing as then existing. To recur to the case I put

1855.
 TIPPING
 v.
 ECKERSLEY.
 Judgment.

during the argument, trying perhaps *idem per idem*:—suppose these were dyeing mills, would the Defendants, under this instrument, have a right to deal with the stream in any manner which could possibly interfere with or alter it from the state in which it existed at the date of the instrument? The question is not a mere question of damage, but whether an act is done which is in any way contrary to or at all affects the Plaintiff's right.

It was argued, that this view might be reduced to a palpable absurdity; that if the Defendants had poured but a kettleful of hot water into the brook above the Plaintiff's mill, the Court must interfere. But in this case, I find upon the evidence of the Defendants themselves—and certainly it is singular that it should come from their affidavit, and not from the affidavits of the Plaintiff's witnesses—that there was one instance when, at six o'clock at night, the natural temperature of the water being 57°, the water at the weir, after the heated water had been poured in, was 70°, and the water in the Plaintiff's jackwell, which the Plaintiff was to use for the purpose of condensing, 68°. This, as it seems to me, is a material interference with the quality of the water; and the question whether that interference is such as to give the Plaintiff a right to damages, is precisely a question that the Plaintiff is not obliged to try. His right under the demise is the free use and enjoyment of the natural stream. The Defendants, by operations of their own, have taken that stream out of the course of nature, have heated it to this degree of heat, and given him, for the condensing purposes of his engine, water 11° higher in temperature than the water which, according to the demise, he should receive.

On that part of the case I do not think it right that the Plaintiff should be put to the expense of trying, by engineering evidence, how far an increase of 11° in temperature

would injure him, when I am quite satisfied by the engineering evidence of the Defendants' own witnesses.—[His Honour investigated the evidence of the engineering witnesses.] Every witness admits that, whether you can measure the precise degree of damage likely to be done or not, it is better for the Plaintiff's purposes to have water at a lower degree of temperature. One says, the best temperature would be 41°—another 32°. But above 41°, I am at liberty to take it on the Defendants' own evidence, that every additional degree of heat renders the water somewhat less fit for condensing purposes; and when it is said that no positive injury is proved (although, in fact, one witness has spoken to the point as to the increased temperature of the water in the Plaintiff's jackwell having produced *some* injury), it seems to me that the injury, however trifling, is that to which the Plaintiff, under this demise, is not bound to submit, his rights under that demise being to have so much of the stream as is wanted for his works in its natural state.

The result is, that I shall grant a perpetual injunction, restraining the Defendants from discharging or returning, or causing or permitting to be discharged or returned, into the brook at any point above the weir, any heated water, so as to cause an increase in the temperature of the water in the Plaintiff's jackwell. That is the only injunction I can give at the present hearing. As to the rest of the motion, I shall direct it to stand over; the Plaintiff to proceed to bring such action as he may be advised in respect of the matters complained of in the bill, other than the discharge of such heated water, at the next assizes.

In regard to costs, as a considerable portion of this case has been occupied with the question of quantity, I should grant the injunction without costs, if the Plaintiff does not bring the action. If he does bring the action, the rest of the motion will stand over, and the question of costs also.

1855.
TIPPING
v.
ECKERSLEY.
Judgment.

1856.

Jan. 10.

LAFONE v. THE FALKLAND ISLANDS COMPANY AND OTHERS.

THE FALKLAND ISLANDS COMPANY v. LAFONE.

*Cross Suit—
Time to answer—“Full
and sufficient
Answer”—Ex-
ceptions.*

Where the Plaintiff in the original suit had obtained the usual order, giving him time to answer a cross bill, after the Plaintiff in the cross suit should have put in a “full and sufficient answer” to the original bill:—*Held*, that, for the purpose of computing the time so given, the answer must be considered sufficient from the time of its being put in, unless proved insufficient upon exceptions.

THESE were an original and cross cause.

The bill in the original cause was filed on the 28th of April, 1855, and the cross bill was filed on the 1st of May following. The Defendants in the original suit were the company and some of their officers, who were made Defendants for the purpose of discovery. All these Defendants appeared by the same solicitor, before the 23rd of May, 1855, on which day the Plaintiffs in the original suit obtained and served the usual order for time to answer the cross bill after the Defendant company should have put in a “full and sufficient answer” in the original suit. All the Defendants to the original suit, except one, put in their answers on the 14th of December, 1855. The other Defendant changed his solicitor, and had not yet answered. On the 9th of January, 1856, the company obtained a writ of attachment against *Lafone* for want of an answer in the cross-suit.

This was a motion, dated January 10, 1856, to discharge the attachment for irregularity, or to suspend it, until *Lafone* should have made default in answering the cross bill within six weeks after all the Defendants should have filed sufficient answers to the bill in the original suit, or until default should be made by *Lafone* in answering the cross bill within eight weeks from the date of the notice of motion; and that *Lafone* might have six months further time to answer the cross bill.

Argument.

Mr. Rolt, Q. C., and Mr. Giffard, for the motion.

The time limited by the order for *Lafone* to answer will not begin to run until the expiration of the period within

which exceptions may be taken to the Company's answer—that is, until the expiration of six weeks from the 14th of December. Therefore, the attachment was irregular. If not originally irregular, it would be within our power to make it so at any time within the six weeks by filing exceptions. The practice in injunction causes was different, but then in those causes the injunction was until answer or further order, and nothing was done except in the presence of the parties upon motion.

Mr. *Murray*, from the Record and Writ Clerks' office, handed up to the Vice-Chancellor a brief in a cause before the Lords Justices, of *Sibbald v. Lowrie* (a).

Mr. *Willcock*, Q. C., and Mr. *Bates* contra, were not heard.

1856.
LAFONE
v.
FALKLAND
ISLANDS CO.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think the true meaning of the words "full and sufficient answer" in this order is, that the answer must be such as this Court always deems sufficient—namely, an answer to which no exceptions have been taken. That is the construction in injunction causes, and I think in every case. For instance: a Defendant, having been attached for want of an answer, is discharged on putting in his answer, though

Judgment.

(a) Lords Justices, March 8th, 1853. In that case the Clerk of Records and Writs had refused to file interrogatories on behalf of a Defendant, for the examination of the Plaintiff under 15 & 16 Vict. c. 86, s. 19, on the ground that six weeks had not elapsed since the filing of the Defendant's answer; and, by the terms of that section, such interrogatories cannot be filed "until after a sufficient answer is filed."

tories, urging that the section did not prevent the interrogatories being filed until after the answer should be *deemed or found to be* sufficient; that every answer was sufficient until proved to be otherwise, and that a Defendant might file a bill of discovery without waiting for six weeks after filing his answer.

Mr. *Follett*, Q. C., applied to the Lords Justices for an order that the Clerk of Records and Writs might file such interroga-

The Lords Justices ordered the interrogatories to be filed at once, subject to the right of the Plaintiff to move to take them off the file, with costs, if the answer should turn out to be insufficient.

1856.
 LAFONE
 v.
 FALKLAND
 ISLANDS Co.
 Judgment.

the Plaintiff may afterwards file exceptions to it, and may re-commit the Defendant if the answer be found insufficient. This Court has always been in the habit of holding that every answer is sufficient until, by exceptions being heard and allowed, the contrary is decided.

The case before the Lords Justices, which has been referred to, arose upon the 19th section of the 15 & 16 Vict. c. 86, which enables a Defendant, after he has put in a sufficient answer, to file interrogatories for the examination of the Plaintiff, and to give him a copy of the interrogatories. In that case the Court directed that interrogatories should be filed immediately after the Defendant had put in his answer, reserving to the Plaintiff all his rights, and leave to move to take them off the file with costs in case it should turn out that the answer was insufficient, if exceptions should be taken, and the case should come before the Court and be heard and discussed. The result is, that, in future, interrogatories may be filed by a Defendant as a matter of course on the answer coming in; and it will be equally of course, if the answer turns out insufficient, that there will be a motion to take the interrogatories off the file for irregularity.

There is much force in the observation which has been made as to the attachment becoming irregular by an *ex post facto* proceeding, but it is not conclusive. A party who has put in an answer in such a case, and has then issued an attachment, does this at the peril, if his answer be afterwards excepted to, of shewing that it is sufficient. If it be not, an application may be made to set aside the attachment, and an action may be brought against him for false imprisonment. On the other hand, if the party had to wait until the time within which exceptions could be taken had expired, there might be great hardship, because his answer might be sufficient on the day on which he put it in. The only mode of shewing to this Court that there is any doubt of the sufficiency of an answer is, by taking exceptions to it, and referring them.

1856.

CASSELL v. STIFF.

Jan. 24.

IN June, 1855, the Plaintiff agreed with *Armand le Chevalier* and *Alexandre Paulin*, to purchase from them their copyright in this country in a *French* weekly illustrated newspaper called "*L' Illustration*." *Le Chevalier* and *Paulin* published this newspaper in *France*, and on the title page of it they had caused to be printed a notice, reserving their right to reproduce it in this country, pursuant to the provisions of the 15 & 16 Vict. c. 12.

After their agreement with the Plaintiff for the sale to the Plaintiff of the copyright, *Le Chevalier* and *Paulin*, on the 21st of June, 1855, caused the then last preceding number of the periodical "*L' Illustration*," to be registered in the registry book of the Company of Stationers in *London*, and deposited a copy of it in manner prescribed by the said Act of Parliament and the 7 & 8 Vict. c. 12; and on the same 21st day of June, 1855, the said *Armand le Chevalier* and *Alexandre Paulin* caused an entry to be made in the said register book, of the assignment by them to the Plaintiff of their copyright in the said periodical work, and of the name and place of abode of the Plaintiff as assignee thereof, in manner provided by the 5 & 6 Vict. c. 45, intituled "An Act to amend the Law of Copyright."

The Plaintiff *Cassell* filed the bill in this suit against *Stiff* and *Vickers*, stating by paragraph 6, that under the

three months after the publication of the last part thereof:"—*Held*, that a *French* newspaper published weekly, and not intended to be completed in any definite number of parts, must be registered within three months after its commencement, or, if it had commenced before 1852, within three months after the date of the Order in Council.

Semble, the registration of a number of such a periodical in 1855, long after its commencement, did not extend to the succeeding numbers the protection of the International Copyright Acts.

Neglect to register on the part of the officials at *Stationers' Hall* prevents an author having the benefit of the statute as against the public.

International Copyright—Order in Council—Registration—French Newspaper.

The International Copyright Acts, and the convention with *France* and Order in Council made thereunder, do not exempt authors of works in *France* claiming copyright in this country from the conditions affecting authors of works in this country.

The Order in Council of the 10th of January, 1852, providing that *French* works must be registered at *Stationers' Hall* within three months after the first publication thereof in *France*, "or, if such work be published in parts, then within

1856.
CASSELL
v.
STIFF.
—
Statement.

circumstances and in manner aforesaid the said Plaintiff became, and he had ever since been and then was, entitled to the property and copyright within the dominions of her present Majesty, of and in the said periodical work called 'L' Illustration,' and of and in the original articles and papers, prints, drawings, woodcuts, and engravings therein respectively from time to time appearing, contained, and published, and henceforth from time to time to appear and to be contained and published therein, and to the sole and exclusive right and liberty of printing, publishing, translating, and selling within the dominions of her said present Majesty, the said articles, papers, prints, drawings, woodcuts, and engravings, respectively from time to time appearing and contained and published, and henceforth from time to time to appear and to be contained and published, in the said periodical work 'L' Illustration:' and the bill charged the Defendants with having infringed the Plaintiff's right, by printing, publishing, and selling, in divers numbers of a periodical called the 'London Journal,' divers prints, drawings, woodcuts, and engravings, together with the names or designations thereof, which said prints, drawings, woodcuts, and engravings, together with the said names or designations, were piratically copied from prints, drawings, woodcuts, and engravings, and the names or designations thereof, published in the said periodical work 'L' Illustration,' the same prints, drawings, woodcuts, and engravings being in some instances exact copies of such prints, drawings, woodcuts, and engravings so published in 'L' Illustration,' although sometimes reduced in size, and in others being altered or varied in merely a colourable manner, and the names or designations affixed to such pirated prints, drawings, woodcuts, and engravings being altered or varied in merely a colourable manner from the names and designations affixed to the corresponding prints, drawings, woodcuts, and engravings in 'L' Illustration:' and the bill prayed for an account of profits and an injunction.

By the 7 & 8 Vict. c. 12, s. 2, Her Majesty is empowered by Order in Council to direct that, as respects books, prints, &c., after a future time to be specified in such order, published in any foreign country named in the order, the authors thereof and their assigns are to have the privilege of copyright therein during such period as should be defined in such order, not exceeding the term of copyright which authors might be then entitled to in this country under the existing Acts of Parliament. Section 3 enacts, that, as to books, the provisions of the 5 & 6 Vict. c. 45, or any other like statute then in force, should apply. But by section 6, an author &c., or his assigns, is not to be entitled to the benefit of that Act or of any Order in Council in pursuance thereof, unless, within a time therein to be specified, the book, print, &c. shall have been registered as therein mentioned, and a printed copy of the book or print deposited as therein mentioned.

1856.
 CASSELL
 v.
 STIFF.
 Statement.

On the 3rd of November, 1851, a convention for an international copyright was signed at *Paris* between Her Majesty and the *French Republic*, which was ratified on the 8th of January, 1852, and was presented to both Houses of Parliament by command of her Majesty in 1852; and the 8th article thereof provided, that authors or translators, or their assigns, of works which had first appeared in *France* should have no copyright therein unless the work should have been registered at *Stationers' Hall*.

By an Order in Council, dated the 10th day of January, 1852, reciting that such convention had been made under the authority of the 7 & 8 Vict. c. 12, her Majesty in council ordered, that, after the 17th of January, 1852, the authors &c. of books, prints, &c., and their executors, administrators, and assigns, "shall, as respects works first published within the dominions of *France* after the said 17th day January, 1852, have the privilege of copyright therein for

1856.
 {
 CASSELL
 v.
 STIFF.
 —
Statement.

a period equal to the term of copyright which authors, inventors, designers, engravers, and makers of the like works respectively first published in the United Kingdom are by law entitled to: Provided such books, dramatic pieces, musical compositions, prints, articles of sculpture, or other works of art, have been registered, and copies thereof have been delivered according to the requirements of the said recited Act within three months after the first publication thereof in any part of the *French* dominions, or, if such work be published in parts, then within three months after the publication of the last part thereof."

Argument.
 —

Mr. Rolt, Q. C., Mr. Webster, and Mr. Goren for the Plaintiff

The illustrations are part of the publication and protected by the law of copyright: *Bogue v. Houlston* (a). [VICE-CHANCELLOR.—Should not the assignment of a copyright be in writing?] The want of it must be specially pleaded, and no objection on that ground has been made in this case: *Cocks v. Purday* (b); and an equitable title is sufficient to entitle the Plaintiff to an injunction against piracy: *Mawman v. Tegg* (c). The 15th & 16th Vict. c. 12, s. 7, provides that any article published in any newspaper or periodical in a foreign country may, if the source from which the same is taken, be acknowledged, be republished or translated in any newspaper or periodical in this country, unless the author has signified his intention of preserving the copyright therein, in which case the same shall, without the formalities required by that Act in case of books, receive the same protection as by the International Copyright Act

(a) 5 De G. & S. 267.

(b) 5 C. B. 860; 4 Exch. 145.

(c) 2 Russ. 385.

or that Act is extended to books. [VICE-CHANCELLOR.—That refers you back to the 7th & 8th Vict. c. 12.] Not so as to oblige foreigners to observe the formalities prescribed by that statute, only to give them the protection that is afforded. [VICE-CHANCELLOR.—Would such protection be given without your complying with the formalities which authors have to observe to obtain copyright in their books?] We submit that it would; but if not, the Plaintiff has complied with all the requisitions of the Acts. It was only possible to register this publication in the manner adopted by the Plaintiff. The word “last” in the Order in Council must mean “then last,” and “first” must mean the first number from which the owner is to have any copyright.—They also stated that there had been some delay in registering the work on the part of the officials at *Stationers’ Hall*.

1856.
CASSELL
v.
STIFF.
—
Argument.

VICE-CHANCELLOR.—I think it is too doubtful for me to grant an injunction; the motion must stand over, with liberty to the Plaintiff to bring such action as he may be advised, and liberty to apply.

Mr. *James*, Q. C., and Mr. *Smythe* contra.

There is no case made even for that, there is no allegation in the bill that the particular pictures &c. said to be pirated belonged to *Le Chevalier* and *Paulin*. [The VICE-CHANCELLOR referred to par. 6 of the bill, which is stated above.] That is not enough; if it were, the assign of such a copyright or his representatives might claim 100 years afterwards the copyright in articles written by authors who were not born at the date of the assignment. Besides, copyright by the laws of this country is given to authors in all cases except that of a periodical, in which case the owner can only obtain copyright by paying the author first: *Richardson v. Gilbert* (a). That is not alleged to have been done in this case.

(a) 1 Sim. N. S. 336.

1856.
 CASSELL
 v.
 STIFF.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It is almost of course on an application of this kind, unless the Court sees there is nothing in the case made by the Plaintiff, to give him liberty to bring an action, and to give the Defendant liberty to apply, so as to enable him to urge the Plaintiff to dispose of the matter without delay.

With respect to the questions of infringement of the copyright or the sufficiency of the registration, I do not require an answer. But I have a serious doubt upon the construction of the Act of Parliament, the 15th & 16th Vict. c. 12, which makes it unnecessary for me to hear the other side, as I cannot grant an injunction pending the action. By the 7th section of that statute it is enacted, that, notwithstanding anything in the International Copyright Act or in that Act contained, "any article of political discussion which has been published in any newspaper or periodical in a foreign country, may, if the source from which the same is taken be acknowledged, be republished or translated in any newspaper or periodical in this country."

This clearly, so far, does not relate to translations only, because the International Copyright Act expressly excepts translations (a). Therefore any one is to be at liberty to republish articles from newspapers in their original language.

The section continues, "And any article relating to any other subject which has been so published as aforesaid, may, if the source from which the same is taken be acknowledged, be re-published or translated in like manner, unless the author has signified his intention of preserving the copyright therein and the right of translating the same in some conspicuous part of the newspaper or periodical in which

(a) 7 & 8 Vict. c. 12, s. 18.

the same was first published." I think the Plaintiff has sufficiently brought himself within that part of the section, because his publication contains a notice, that, having regard to the international treaties, the Plaintiff reserves his right of reproduction, which is a sufficiently apt word in this case. Then it is provided, that, this being done, "the same shall, without the formalities required by the next following section, receive the same protection as is by virtue of the International Copyright Act or this Act extended to books."

1856.
CASSELL
v.
STIFF.
—
Judgment.

The next following section prescribes certain formalities to be observed in case of translations from books or dramatic pieces; with that the Plaintiff has nothing to do. The result is, that having secured the protection of the statute by due notice, he is to have the same protection as is given by the International Copyright Act, 7 & 8 Vict. c. 12.

What protection, then, is given to a book, or rather to an author, by that statute? It provides, by sect. 2, that authors are to have the privilege of copyright therein during such period or respective periods as shall be defined in "an order in council," not exceeding however, as to any of the above-mentioned works, the term of copyright which authors of works published in this kingdom would have by a former Act. It has been argued that this is the protection referred to by the 15th & 16th Vict. c. 12. In one sense it is, but does it mean totally free from all conditions attached to such protection? I think the only reasonable construction is, that he is to have the same protection which the author of any other book would obtain under an order in council. He would obtain in that manner protection subject to all the other provisions of the statute, otherwise authors of foreign works would be placed in a better position than authors in this country, which certainly was not intend-

1856.
 CASSELL
 v.
 STIFF.
 Judgment.

ed. There is a careful and jealous provision that no author of a foreign work shall be in a better position in this country than the authors of works here are. It was not intended to give them anything more. The 3rd section of the statute provides, that under an order in council a foreign author is to be subject to all the provisions of the general Copyright Acts, unless it should be otherwise specified in the order. In the order in council there is a difference made. There is superadded a provision that the work is to be registered according to the requirements of the 7th & 8th Vict. c. 12, "within three months after the first publication thereof in any part of the *French* dominions; or if such work be published in parts, then within three months after the publication of the last part thereof."

The only interpretation of that clause is, that it refers to a publication which is to be completed in a specified number of parts, and not one which is to be continued for an indefinite period. There would be no sense in the other construction. The effect of it would be that at any period the publisher of such a work might register it and carry back his copyright to the earliest period in 1852, when *French* authors first had a copyright in this country. That cannot be the intention; it must mean to apply to a work to be completed in a definite number of parts, and such a work, though not registered at its commencement, may be registered within three months after the publication of the last part. Therefore, of course, what has been done here does not comply with the requisitions of the Act. The first number of this publication has not been registered so as to bring it within the provisions of the statute, because, adopting the argument that the first number mentioned in the Act must mean the first after the privilege was introduced, there is nothing to shew that any numbers of this publication were registered before the registration of that par-

ticular number which it is stated was registered in June, 1855. None of the other numbers have been registered. The public cannot be bound if there is any neglect at Stationers' Hall as to the registration. The object of registration is to give notice to all other publishers that the publication is protected by the statute; if there be any neglect to register, the remedy of the publisher must be against the parties causing such neglect. It cannot affect those who are thereby kept in ignorance of the existence of the copyright.

1856.
CASSELL
v.
STIFF.
—
Judgment.

I think therefore, that, according to the reasonable construction of the 15th & 16th Vict. c. 12, I cannot now assist the Plaintiff, but I must leave him to assert his rights in such manner as he may think fit.

The motion must stand over, with liberty to the Plaintiff to bring an action, and liberty to all parties to apply.

1856.

Jan. 24th.

GRESLEY v. MOUSLEY.

Production of Documents—Purchase by Solicitor—Undervalue—Confidential Communications.

In a suit by the heir and general devisee of the client against the devisees and executors of the solicitor, to set aside a purchase by him from his client, on the grounds of its being at an undervalue, and the client being then in embarrassed circumstances:—*Held*, that copies of subsequent conveyances from the solicitor to purchasers from him, and a valuation of the estates, and mortgages made by the vendor, were not privileged documents.

THE bill in this suit was filed by Sir *Thomas Gresley*, the equitable devisee in remainder and heir of Sir *Roger Gresley*, against the devisees in trust and executors of *William Eaton Mousley*: and the equitable tenant for life, and the devisees in trust and executors under the will of Sir *Roger Gresley*.

The bill stated, in effect, that *Mousley* was the confidential solicitor of Sir *Roger Gresley*; and that, being such, he purchased an estate from Sir *Roger Gresley* at an undervalue, and when the latter was in embarrassed circumstances: and the bill sought to set this transaction aside. It contained the following charges:—

The Defendants *William Eaton Mousley* and *John Hardcastle Mousley* have in their possession, custody, or power, and in the possession, custody, or power of their solicitors or agents, divers books of account, and other books and papers, containing entries of or relating to the professional services rendered by the said *William Eaton Mousley*, deceased, to the said Sir *Roger Gresley*, as his attorney, agent, and confidential adviser, and, in particular, relating to his the said Sir *Roger Gresley's* real estates, and the mines and minerals of the said Sir *Roger Gresley* under

Held, that, for the purpose of an application for production of documents, it must be assumed that the Plaintiff's case, as alleged in the bill, is true, in order to test whether he is entitled to production of documents upon that assumption; because, if the Court must wait until the fate of the litigation is known, that would be equivalent to refusing production.

Held, that the executors of the solicitor could not claim privilege against the real representative of the vendor for any documents as confidential communications with the vendor.

The Defendants, suggesting that the executors of the vendor, who were also Defendants, had an interest in some of the scheduled documents:—*Held*, that they should be served.

the same, and the management and receipt of the rents and profits thereof by the said *William Eaton Mousley*, deceased, as such receiver and agent as aforesaid, and the sales of such parts thereof as were sold by or with the assistance of the said *William Eaton Mousley* as aforesaid, and relating in particular to the said sale and conveyance to himself of the month of February 1837, and the treaty for such sale; and if any bills of costs were, on the occasion of the said sale to the said *William Eaton Mousley*, in 1837, as aforesaid, delivered to the said *Sir Roger Gresley*, then the books and other papers from which such bills of costs were made out, or copies or the drafts of such bills of costs.

1856.
 ———
 GRESLEY
 v.
 MOUSLEY.
 ———
Statement.

The Defendants *William Eaton Mousley* and *John Hardcastle Mousley* have also in their possession, custody, or power, or in the possession, custody, or power of their solicitors or agents, the draft of the said conveyance of the 17th and 18th days of February, 1837, and some copy, and some abstract of or extract from the said conveyance, and divers other deeds, copies, and abstracts of deeds, wills, accounts, memoranda, papers, and writings relating to the matters aforesaid, and from which, if produced, the truth of such matters would appear.

By their answer, the Defendants, the *Mousleys*, stated that the Defendant *John Hardcastle Mousley* had in his possession, as the surviving partner of *William Eaton Mousley*, the particulars mentioned in the first part of the schedule thereto, which related to the professional services rendered by *William Eaton Mousley* to *Sir Roger Gresley* as his attorney and confidential adviser, and to the sales of such parts of his estates as were sold by or with the assistance of the said *William Eaton Mousley*; but that these belonged to and were kept by *William Eaton Mousley* in his professional character as solicitor for *Sir Roger Gresley*, and ought not to be produced to the Plaintiff in this suit.

1856.
 GRESLEY
 v.
 MOUSLEY.
 Statement.

And the Defendants admitted that they had in their possession the particulars mentioned in the second part of the schedule to their answer, which related to the hereditaments purchased by *William Eaton Mousley*, and to his title as the purchaser thereof, and which related to and concerned such title exclusively, and did not in any manner relate to or concern or make out the title of the Plaintiff.

The second part of this schedule enumerated, among other things, certain copies of conveyances from *William Eaton Mousley* to purchasers from him of parts of the estate which he had purchased from *Sir Roger Gresley*, a valuation of the same estate, and mortgages by *Sir Roger Gresley*.

Argument.

Mr. Rolt, Q.C., and Mr. G. L. Russell, for the Plaintiff, cited *Chant v. Brown* (a), *Russell v. Jackson* (b), *Follett v. Jefferyes* (c).

Mr. James, Q.C., and Mr. Cairns, contra.

The documents required by the former of the two paragraphs in the bill are not admitted to relate to the matters in question in the suit. They are communications which passed between *Sir Roger Gresley* and his solicitor during the whole of their connexion with one another, and the Plaintiff has shewn no title to have them produced. At any rate, the personal representatives of *Sir Roger Gresley* are interested in some of them, and they ought to be present on this application.

Then, the documents in the second part of the schedule to the answer are documents of title of the Defendants, and are not any part of the Plaintiff's title.

The reply was not heard.

(a) 9 Hare, 790.

(b) Id. 387.

(c) 1 Sim. N. S. 1.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The bill in this suit states, that one *Mousley* was, in his lifetime, the confidential solicitor of the Plaintiff's ancestor, and bought an estate of him; and that, being such solicitor, *Mousley* knew that the property was of greater value than the sum which he gave for it; and the bill charges that the Defendants, the representatives of *Mousley*, who has since died, have in their possession divers documents, particularising the draft of the conveyance to *Mousley*, and certain copies of deeds of conveyance, relating to the matters in question. The answer of these Defendants admits the possession of the documents mentioned in the second part of the schedule thereto, which it states "relate to the hereditaments purchased by *Mousley*, and to his title as the purchaser thereof, and which relate to and concern such title exclusively, and do not in any manner relate to or concern or make out the title of the Plaintiff." Among the documents so scheduled are copies of conveyances from *Mousley* to purchasers from him of parts of the property, which would shew for what prices he sold such parts; and also, amongst other things, a valuation of the estate; and these, it is argued, the Defendants ought to be privileged not to produce. But it is plain that these documents may be most material to the Plaintiff's case, which is, that the value of the estate was in truth greater than the sum of purchase money which was given for it by *Mousley*. The Defendants deny that there was any fraud in the purchase; but, the case being simply that of a solicitor purchasing from his client, and being wholly founded on the allegation that such purchase was at an undervalue, it is impossible for the Court not to see that the Defendants are only swearing to the effect of the documents in their possession, the real question being the nature of such documents, and, from the description in the schedule, it seems clear that some of them must contain important evidence for the Plaintiff. I

1856.
 GRESLEY
 v.
 MOUSLEY.
 Judgment.

1856.
 GRESLEY
 v.
 MOUSLEY.
 Judgment

must follow the precedent of *Smith v. The Duke of Beaufort* (a), where it was denied that the documents in the Defendant's possession in any way evidenced or related to any estate, right, or title whatsoever of or belonging to or claimed by the Plaintiff; nor were the same in any way material or necessary to or for the Plaintiff's defence in the action, nor had the Plaintiff any interest in the same: but, nevertheless, an order for their production was made.

The Defendants must have the usual liberty to seal up what does not relate to the Plaintiff's case. It is alleged in the bill, that the vendor was in embarrassed circumstances at the time of the sale, and there are some mortgages on the estate scheduled. These must be produced.

With respect to the first schedule, it is objected that it includes documents in which the executors and trustees are interested, and which have nothing to do with the Plaintiff's case or title. I quite agree that the executors cannot refuse production of any, upon the ground that they were confidential communications of the Plaintiff's ancestor with his own solicitor. If the Plaintiff succeeds in his suit, he would be entitled to see them; and I must assume, for this purpose, the truth of the statements of the bill, in order to test the materiality of the evidence, because it will be too late to inspect these documents after the hearing. The Court, therefore, always makes a similar assumption in such cases, and the Plaintiff is entitled to see all documents to which he would be entitled on the assumption that the vendor was his ancestor, and everything which may assist in proving that the estate was sold at an undervalue.

The executors had better be served; if they consent, there will be no difficulty.

(a) 1 Hare, 507; 1 Ph. 209.

1856.

THE LANCASTER AND CARLISLE RAILWAY
COMPANY *v.* THE NORTH WESTERN RAIL-
WAY COMPANY.

Jan. 12th,
14th, & 18th.

BY the *North Western Railway Act, 1846*, the Defendants were incorporated, and empowered to make a railway from the *Leeds and Bradford Extension Railway* to the Plaintiffs' railway at *Scuffton House*, and a branch line diverging from the main line in the parish of *Tunstall*, and terminating by a junction with the Plaintiffs' railway at *Lancaster*.

*Jurisdiction—
Injunction—
Contract—
Specific Per-
formance—
Railways—
Parliament—
Public Policy.*

In 1848, the Defendants applied to Parliament for an Act to enable them to divert the main line which they were then authorised to construct, and to construct a deviated line to join the Plaintiffs' railway at *Low Park*, situate to the north of *Scuffton House*, and nearer to *Carlisle*.

*Applications
to Parliament
on public and
on private
grounds dis-
tinguished:—
the latter may,
in a proper
case, be re-
strained; the
former can-
not, in any
case, be re-
strained by
injunction.*

The Defendants (a railway company) agreed with the Plaintiffs (also a railway company) not to apply to Parliament to make any line, or branch line, connecting the Defendants' with the Plaintiffs' railway, except a certain main line and branches and certain deviations, for which application had been made to Parliament by the Defendants. And, in consideration of the premises, the Plaintiffs, who had previously opposed, agreed to support the Defendants' application, and, if required, to petition Parliament in its favour. The Plaintiffs performed their part of the agreement, and the Defendants obtained their Act. The Court refused to restrain the Defendants from applying to Parliament for power to make a further deviation, on the ground that the bill, if passed, would be passed on public grounds, which this Court could not try, and with full knowledge of the agreement; while, if rejected, the inconvenience of opposing the bill would be compensated in damages for a breach of the agreement, assuming that agreement to be legal.

But upon the question, whether such an agreement is legal, the Court expressed no opinion.

Agreements against Competition—Railways.

An agreement between two railway companies, that the one company will not carry traffic over a particular portion of their line, *held, obiter*, not illegal.

Railways—Directors—Ultra Vires.

Whether an agreement by the directors of one railway company, that, in return for being entitled to carry traffic over their line on to the line of another railway company, the directors of the first company will, out of the assets of their own company, make certain payments to the latter, is or is not void, as being beyond the powers of the directors—*Quere.*

1856.

THE LANCASTER AND
CARLISLE
RAILWAY CO.

THE NORTH
WESTERN
RAILWAY CO.

Statement.

The Defendants opposed this application.

By an agreement, dated May, 1848, reciting that the proposed alteration had been considered by the Plaintiffs to be prejudicial to their fair interests under their Acts, and under a previous agreement between them and the Defendants, and that the Plaintiffs had opposed the Defendants' application to Parliament, but had, at the request of the Defendants, withdrawn their opposition in consideration of the terms and conditions thereafter stated, it was mutually agreed (*inter alia*) that the Defendants might, in their bill then before Parliament, apply for powers to make a junction of their railway with the Plaintiffs' railway at *Low Park*; that such junction should not be made at any other point without the consent of the Plaintiffs; that the Defendants should not then, or thereafter, apply for or concur, or be interested directly or indirectly in, any Act authorising them to make, or be parties or privy to, or directly or indirectly aid or sanction, any application to Parliament of or by any other person or company for the making, and should not at any time make or concur in the making, or directly or indirectly support or take any interest in any line of railway between *Lancaster* and *Orton*(*a*), or the neighbourhood thereof, other than the particular line of railway to be authorised by the bill then before Parliament, without the express consent, in writing, of the Plaintiffs; that the Defendants should not at any time, without the consent of the Plaintiffs, directly or indirectly, sanction, apply for, make, or support, or be directly or indirectly parties to or interested in any line or branch line, or any application to Parliament for any line or branch line, connecting or serving to connect the Defendants' railway with the Plaintiffs' railway, other than except the main line and

(*a*) *Orton* is situate further to the north, and nearer to *Carlisle*, than *Scuffton House*, *Low Park*, and even *Tebay*.

branches then already sanctioned by Parliament, and the deviations for which application had been made to Parliament in the then present session, and by which the junction of the Defendants' main line with that of the Plaintiffs was fixed at *Low Park*; that, for all passengers, goods, animals, cattle, articles, and things which might be carried over the Defendants' railway, or any part thereof, between *Lancaster*, or any point or place within three miles of *Lancaster* and *Orton*, or *Boroughbridge*, on the Plaintiffs' railway, at or near either of those places, either by the Defendants' company itself, or by any other parties or company, (such traffic having been or being thereafter to be forwarded or carried upon or along the Plaintiffs' railway, or some part thereof, either by the Plaintiffs' company, or some other company or party), the Defendants should pay to the Plaintiffs 5s. for every passenger; and 5s. per ton for each ton of goods, articles, and things; and 5s. for each animal and head of cattle so carried. And that, in consideration of the premises, the Plaintiffs should support the Defendants' application to Parliament, and should, if required, petition Parliament in its favour.

In pursuance of this agreement, the Plaintiffs withdrew their opposition, and supported the Defendants' application to Parliament. And, by the *North Western Railway Act*, 1848 (a), the Defendants were authorised to make the proposed diversion in their main line, and to construct the deviated line to join the Plaintiffs' railway at *Low Park*.

By an agreement, dated 1849, it was agreed, (inter alia), that, notwithstanding anything then conceded, the Defendants would never seek, either by application to Parliament or otherwise, to withdraw, modify, or interfere with the clauses

(a) Afterwards modified by the Defendants' powers as stated in "North Western Railway Act, the text. 1852," but not so as to affect the

1856.
THE LANCASTER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
—
Statement.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v.
 THE NORTH
 WESTERN
 RAILWAY CO.
 —
Statement.

inserted in the Acts of Parliament relating to the Defendants' railway for the protection or advantage of the Plaintiffs; and that the Defendants should not carry or pass over their line, or any part thereof, any traffic between *Lancaster* or any point within two miles of *Lancaster*, and any place on any of the existing lines of the *London and North Western* railway in *Lancashire*, or on the *Lancaster and Carlisle* line, or on the *Caledonian* line. This agreement also contained a stipulation relative to tolls similar to that in the agreement of 1848.

In November, 1855, the Defendants gave notice through the newspapers, as required by the Standing Orders, that they intended to apply to Parliament in the then next session for an Act enabling them to divert the main line, which they were then authorised to construct, and to construct a deviated line to join the Plaintiffs' railway at a point in the township of *Tebay*, situate three miles to the north of *Low Park*, and nearer to *Carlisle*, and to pass over and use the Plaintiffs' railway from such point of junction to *Carlisle*.

A notice of the intended application was served on the Plaintiffs.

The Plaintiffs then filed their bill for an injunction restraining the Defendants from taking any further proceedings in pursuance of their notices, and from presenting any petition, or from being directly or indirectly parties to any application to Parliament, and from taking or continuing any proceedings for the purpose of obtaining an Act to enable the Defendants to abandon their point of junction with the Plaintiffs' railway, near *Low Park*, in favour of a more northerly point of junction, or to authorise anything whatever to be done, or omitted to be done, inconsistent with or repugnant to the said agreements.

Mr. Rolt, Q. C., and Mr. Selwyn, now moved for an injunction as prayed.

1856.
THE LANCASTER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
—
Argument.

That the Court had jurisdiction to perform an agreement of this nature, by restraining an application to Parliament, was clear: *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk, and the Clarence Railway Companies (a)*, and *Heathcote v. The North Staffordshire Railway Company (b)*. And it was for the Plaintiffs to determine whether they would hold the Defendants to their agreements, even if the Defendants could shew, which they could not, that the breach contemplated would leave the Plaintiffs' interests uninjured: *Dickenson v. The Grand Junction Canal Company (c)*.

Mr. Daniel, Q. C., and Mr. Cairns, for the Defendants.

This motion must be refused. For—

First, the clauses relative to an application to Parliament were not intended to refer, and do not refer, to an application such as that which the Defendants contemplate.

Secondly, the agreements are invalid, as being both ultra vires, and in themselves illegal. These objections, which, where they exist, infect the whole of an agreement (*d*), apply, first, to the Defendants' stipulation not to compete with the Plaintiffs on certain portions of the Defendants' line: free competition being for the public benefit, and forming one of the main considerations for which Parliament entrusted them with their high powers; secondly, to the stipulation on the part of the Defendants respecting tolls, which was, in effect, a stipulation to alienate from their own

(a) 2 Ph. 670.

(b) 2 M.N. & G. 100.

(c) 15 Beav. 270.

(d) Addison on Contracts, 146,
and cases there cited.

1856.
 THE LANCAS-
 TER AND
 CARLISLE
 RAILWAY CO.
 ?
 THE NORTH
 WESTERN
 RAILWAY CO.
 —
Argument.

shareholders a certain portion of the income and profit of their railway, and to hand it over to the Plaintiffs; but, still more, thirdly, to the agreement, which it is the more immediate object of this motion specifically to enforce, and by which the Defendants bind themselves, once and for ever, not to apply to Parliament for extended powers. Such an agreement is an attempt to barter away what no subject can sell, and is contrary to public policy. If valid at all, it is valid for ever, no matter how unreasonable it may, under a change of circumstances, eventually prove.

That every one of these stipulations is *ultra vires* is clear from the authorities: *Winch v. The Birkenhead, Lancashire, and Cheshire Junction Railway Company* (a), *Beman v. Rufford* (b), *Shrewsbury and Birmingham Railway Company v. London and North Western Railway Company* (c), *South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company* (d).

Thirdly, the agreement to abstain from applying to Parliament, even if it be not illegal or *ultra vires*, is an agreement of which it would not be proper for this Court to compel specific performance.

The application to Parliament, if made, will be made upon grounds of public policy,—upon the ground that it will be for the benefit of the public to have the agreements rescinded,—grounds upon which this Court cannot enter without constituting itself into an outside Parliament. Besides, an agreement to oust the jurisdiction of Parliament is as unfit to be the subject of specific performance as an agreement to oust the jurisdiction of the Courts of law and equity.

(a) 16 Jur. 1035.

(b) 1 Sim., N. S., 550.

(c) 2 M.N. & G. 324; S. C., 3 Id.

70; 4 De G., M.N. & G. 115.

(d) 3 De G., M.N. & G. 576.

In both the cases cited in support of the jurisdiction, Lord *Cottenham* dissolved the injunction; and in *The Great Western Railway Company v. Rushout* (a), the Court dissolved the injunction so far as it sought to prevent an application to Parliament generally; granting it only to prevent an application out of particular funds.

1856.
THE LANCASTER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
Argument.

Mr. *Rolt*, Q. C., in reply—In reference to the stipulations against competition and as to tolls, referred to other Reports of the *Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company*, as heard at the Rolls (b) and by the Court of Queen's Bench (c)—contending, that here it was not a stipulation to abstain from competition generally. The tolls were not a division of the profits, but tolls imposed only on a limited amount of traffic, and did not exceed a fair equivalent for the inconvenience resulting to the Plaintiffs from the benefits accorded to the Defendants. To enter into such arrangements was not ultra vires, and with the terms so arranged no Court had a right to interfere: *The South Yorkshire Railway and River Dun Company v. The Great Northern Railway Company* (d), *Johnson v. The Midland Railway Company* (e).

In the case of a corporation, as in that of an individual, a contract to abstain from petitioning Parliament for a bill is valid, and one of which this Court will enforce specific performance, unless the interference of the Court would prejudice public interests. Here, the injunction asked would leave public interests untouched. All the Court is asked to say, is 'You, the Defendants, having made this agreement, shall not be the parties to set Parliament in motion.'

(a) 5 De G. & S. 290.

(b) 16 Beav. 441.

(c) 17 A. & E. 665.

(d) 9 Exch. 55; S. C., Id. 642.

(e) 4 Id. 367.

1856.

THE LANCA-
STER AND
CARLISLE
RAILWAY CO.

v.
THE NORTH
WESTERN
RAILWAY CO.

Jan. 18th.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This motion was resisted on several grounds:—

The first ground was, that the clauses relative to an application to Parliament were not intended to refer, and do not refer, to an application such as that which the Defendant contemplate; and, in effect, that there is no agreement to prevent the Defendants from making such an application.



The second ground was, that the agreements themselves are invalid, *first*, as containing a stipulation to part with certain powers with which Parliament had entrusted the Defendants, who thereby agree not to run on a certain portion of their line; *secondly*, as containing a stipulation to hand over a certain portion of the income and profit of the Defendants to the Plaintiffs; and, *thirdly*, as containing stipulations not to apply to Parliament for the purpose of obtaining an Act of the Legislature, it being argued, that any such stipulation is in itself void, because it is contrary to public policy that any engagement, once and for ever binding parties not to apply to the Legislature, should ever be entered into.

The third ground was, that the agreements, for the same reasons for which they were alleged to be void as contrary to public policy, were a fortiori void, as being ultra vires.

I had conceived, that, if I held the present case to be one in which it would not be proper for the Court to interfere, it would not be necessary to express an opinion on any of the other grounds raised. But, upon consideration, I have thought it my duty, especially with reference to the costs of the application,—independently of the consideration that the construction of an agreement is a matter into which Parliament can hardly enter,—to express my opinion as to the true construction of these agreements.

[The opinion of the Court on this point was in favour of the Plaintiffs. Whatever doubt might be entertained upon the construction of the previous agreement, in the agreement of 1848 the Plaintiffs must be taken to be dealing with a company which they foresaw might possibly come into competition with them. Foreseeing that, the intention of the Plaintiffs in entering into the agreement was to tie down the Defendants from applying to Parliament for anything but what Parliament had then previously sanctioned, and what they were then about to apply for powers to do: and, assuming the agreement to be a legal agreement, the Plaintiffs had clearly and definitely expressed their intention by the terms they had used.]

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY Co.
 v.
 THE NORTH
 WESTERN
 RAILWAY Co.
Judgment.

Upon the alleged illegality of the agreements, it is enough to say, that I am not satisfied of the illegality.

With reference to the stipulation on the part of the Defendants to abstain from running on a certain portion of their line, there is no manifest duty imposed upon a company of being carriers upon every portion of their line. They might, if they liked, abstain from carrying altogether; and, assuming them to abstain altogether, I apprehend the public interest would be sufficiently secured by the clause in the General Railway Act, that every person shall be able to pass on paying toll. That is a public right, and whether the Defendants will or will not carry traffic over a particular portion of the line in competition with another company, I have not yet heard anything which satisfies me that such an arrangement would be illegal.

A more doubtful point arises upon the clause which provides, that, in respect of all passengers carried upon a particular portion of the line, but entering on the *Lancaster* and *Carlisle* Railway (which is a part of the clause put in to cover any defect in respect of illegality) certain sums are

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v.
 THE NORTH
 WESTERN
 RAILWAY CO.
Judgment.

to be paid to the Plaintiffs. I cannot doubt that the main object of this clause was to give more effect to the clause relative to competition upon the line. At the same time—although I cannot say that the question is free from doubt (more especially since the view taken by the Lords Justices in *The Shrewsbury and Birmingham Railway Company v. The London and North Western Railway Company*(a))—yet, I cannot think that the case I have mentioned, or any other case, has distinctly decided that an agreement by the directors of one railway company in return for being entitled (for that is what it comes to) to carry traffic over their railway on to the line of another railway company, to make, out of the assets of their own company, certain payments to the latter, is void, as being beyond the powers of the directors; because, under any circumstances, provision would have to be made with reference to the payment to be made by the one company to the other, for the accommodation of the passing of their traffic. Possibly, it may be right hereafter to have it distinctly determined whether this clause be illegal or not. All I say at present is, that I am not satisfied it is illegal.

For the same reasons, I am not satisfied that these stipulations relative to tolls and competition are ultra vires.

With regard to the main question, which arose upon the stipulation not to apply to Parliament for any line of railway running in a particular direction, except that mentioned in the agreement, there are two points for consideration:—first, whether it is competent to a company to enter into any such contract at all; and, secondly, (which I think is by no means an immaterial question in this case), whether, supposing the contract to be valid, it is one as to which *this* Court should interfere to compel specific performance, (for that is

(a) 4 De G. M'N. & G. 115.

in effect, what it amounts to), by granting an injunction. These two points seem to me to be perfectly distinct from each other.

That the Court has power to interfere by injunction to restrain a person from petitioning Parliament, upon a proper case being made out, I never entertained any doubt: indeed, it would not be possible to entertain the slightest doubt after the decisions:—that of Lord *Cottenham* not being by any means the first, for Lord *Brougham* had expressed himself equally clearly in the case of *Ware v. The Grand Junction Waterworks Company* (a), in which the Vice-Chancellor of *England* had granted an injunction restraining the company from proceeding before Parliament. Lord *Brougham*, although he dissolved that injunction on the merits, made use of this language:—"It is quite idle to represent this, as was at first sought to be done, as an attempt to restrain by injunction the proceedings of the High Court of Parliament. This is no injunction to restrain any proceedings of Parliament, or to restrain any parties who may be called upon by the authority of Parliament from intervening in such proceedings. It is simply an injunction to restrain a partnership, now existing under a certain constitution, from doing any act in its corporate capacity with a view to obtain a new modelling of that constitution." That being the view taken by Lord *Brougham*, Lord *Cottenham*, C., on subsequent occasions, expressed, with great clearness, the exact position of the Court with reference to restraining a party from proceeding to petition Parliament. He said, that it was exactly the same question as arose with respect to restraining a party from proceeding at law in the time of Lord Chancellor *Ellesmere*; and that, in effect, it was then decided, and rightly decided, that this Court, acting in personam, in no way interferes with the jurisdiction of another

1856.
THE LANCAS-
TER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
Judgment.

(a) 2 Russ. & My. 470.

1856.

THE LANCAS-
TER AND
CARLISLE
RAILWAY CO.

v.
THE NORTH
WESTERN
RAILWAY CO.

—
Judgment.

Court; but simply says, it is not competent for a given party to apply to that particular jurisdiction.

How far it is expedient or proper for the Court to exercise this jurisdiction, is a totally different question, and, upon this, considerable light has been thrown by three decisions of Lord *Cottenham*.

The earliest, which occurred in 1839, was the case of *The Attorney-General v. The Manchester and Leeds Railway Company* (a). There, certainly, the conduct of the parties was such as would have induced the Court, if anything could induce the Court, to take a very summary mode of arresting their proceedings. There having been a motion pending before the Lord Chancellor with reference to a particular bridge, which was about to be made over the *Wakefield* road in a certain manner which was supposed to be injurious to the public, and which the Attorney-General sought to restrain, the parties had undertaken that nothing should be done, until the hearing of the cause, to interfere with the existing state of things, and, having given that undertaking, they took the opportunity of inserting, in a bill before Parliament, a clause to liberate them from that undertaking entirely, and to enable them to do that which they had so undertaken not to do. The Lord Chancellor, having, in the beginning of his judgment (b), expressed his opinion in the strongest terms, to the effect, that the attempt to procure the passing of this clause was a direct breach of the undertaking, said this:—(c) “Of the conduct of the parties, and as to what ought now to be the course of proceeding, I have no doubt; but I have very great doubt as to the mode of carrying it into effect. That I must take into consideration. I do not feel that I can interfere in the present state of the proceedings. Whether I might have done it before the party applied to Parliament, is a matter

(a) 1 Railw. Cas. 436.

(b) Page 455.

(c) Page 458.

that I do not go into. It will require great consideration before this Court will prevent people from petitioning the Houses of Parliament. That is the first proceeding; but, when they have petitioned, and either House has entertained the bill, it becomes the act of the House and not the act of the party. No case has been cited to me which would shew that I have that power, without reference to property,"—which he explains more fully in a subsequent case;—"the cases where the Court has interfered to prevent the application of funds are a different matter: they are collateral to the question. No case has been cited in which this Court has interfered to restrain parties from petitioning Parliament, or applying to Parliament for any law which they supposed would be granted: unless a very strong authority is produced for that purpose, I should be disinclined to assume that jurisdiction." The result was, that the parties withdrew the clause. But the case furnishes a strong expression of his Lordship's opinion, that he saw very considerable difficulty in preventing an application to Parliament, in a case where there was such a solemn undertaking; and that, unless strong authority were adduced, he should not assume that particular jurisdiction.

In a subsequent case there are some observations which appear, at first sight, a little more favourable to the Plaintiffs' contention for an injunction. It is the case of *The Stockton and Hartlepool Railway Company v. The Leeds and Thirsk and the Clarence Railway Companies*(a), which occurred in 1848. But there it must be observed, as in the next case I have to refer to, that the application was to restrain a party from petitioning in opposition to a bill. The Lord Chancellor, after expressing his satisfaction at finding that the question of jurisdiction was not contested, says there is no doubt whatever that the jurisdiction exists.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY Co.
 v.
 THE NORTH
 WESTERN
 RAILWAY Co.
 Judgment.

(a) 2 Ph. 670.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v.
 THE NORTH
 WESTERN
 RAILWAY CO.

Judgment.

" A party, who comes to oppose a railway bill in Parliament, does so solely in respect of his private interest, not as representing any interest of the public, or for the purpose of communicating any information to Parliament. He is not even allowed to be heard as a petitioner against the bill, unless he has a locus standi in respect of some property or interest liable to be affected by it, if it should pass into a law. This Court, therefore, if it sees a proper case connected with private property or interest, has just the same jurisdiction to restrain a party from petitioning against a bill in Parliament, as if he were bringing an action at law, or asserting any other right connected with the enjoyment of the property or interest which he claims. About that there can be no question whatever, nor could any doubt be raised about it, except by the same confusion of ideas which gave rise to the old discussion between Courts of law and equity." But observe how Lord *Cottenham* puts it. He says—A party who opposes a bill is not submitting any grounds of public policy for the consideration of Parliament—he is not conveying any information to enable Parliament to act; he is standing on his own private interest alone,—his right to a particular field or house: otherwise, he would not even be heard in Parliament to arrest the passing of the bill. Of course, he could sell the house or the field to the company; and, if so, he could equally contract not to object to the company applying to Parliament for power to take that field or house. It is a mere contract in respect of his property, affecting nothing but his property—a contract in which the public have no interest whatever, and in which Parliament has no interest whatever, except the interest which the Legislature must always have to see that justice is done to individuals. The case, therefore, of a party so circumstanced, opposing on the ground of his private interests, and, as Lord *Cottenham* says, "*solely* in respect of his private interest," is extremely different from the case of a party submitting a public measure (for all these Acts are public measures, and

can only be founded on public advantage), and “communicating,” as Lord *Cottenham* expresses it, “information to Parliament,” as to what he conceives will be for the public benefit.

In the last case to which I have to refer, Lord *Cottenham* goes still more fully into the subject. It is the case of *Heathcote v. The North Staffordshire Railway Company* (a). It occurred in 1850, and gives the latest view of Lord *Cottenham*, who decided it immediately before he resigned the Great Seal. That, again, was an application in respect of a petition against a railway bill. Lord *Cottenham* says:—“Upon the first ground it has been suggested, that this Court could not interfere without infringing upon the privileges of Parliament; so the Courts of common law thought at one time; and there is as much foundation for the one as for the other supposition. In both cases the Court acts upon the person, and not upon the jurisdiction. In a proper case, therefore, I have said here and elsewhere, that I should not hesitate to exercise the jurisdiction of the Court, by injunction, touching proceedings in Parliament for a private bill, or a bill respecting property; but, what would be a proper case for that purpose it may be very difficult to conceive.” It was said that this was the very case which Lord *Cottenham* would have conceived. I can hardly suppose that Lord *Cottenham* would have said, it was difficult to conceive a case so simple—the case of an express agreement not to apply for an Act. He proceeds:—“The case of Parliament differs widely from that of the Courts of common law:—the province of the latter is to enforce legal rights, and the object of the injunction is to prevent an inequitable use of such legal rights; but the ordinary province of Parliament in such bills is to abrogate existing rights, and to create new rights. To hold, therefore, that no application should be made to Parliament because the object of the application was to interfere with some right or interest of some

1856.
THE LANCA-
STER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
—
Judgment.

(a) 2 M’N. & G. 100.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v.
 THE NORTH
 WESTERN
 RAILWAY CO.
 —
Judgment.

other party, would be, in effect, to hold that this Court should, by its injunction, deprive the subject of the benefit of Parliamentary interference in all such cases. In many settlements there is a want of some power essential to the proper management of the property ; and Parliament is in the habit of exercising its discretion in supplying the defect : but, if any party interested could obtain an injunction against such proceeding upon this ground, that what was proposed would interfere with his estate and interest, Parliament would have no opportunity of exercising its discretion. So, in railway Acts, every owner in the line of the intended railway has an interest in the exercise of the powers asked ; the promoters of the bill ask for powers to interfere with their interest, and to take land, which the owners may be most anxious to retain ; but it has never been suggested, that the Court could interfere by injunction to prevent the promoters from prosecuting such bill. The injunction, therefore, cannot be granted upon the ground that the Act applied for would interfere with existing rights, it being the very object of it to do so."

To apply these principles to the case before me :—Suppose an agreement by a public company containing an express stipulation,—not confined to any particular portion of the agreement, but extending to the whole of it,—binding the company never to apply to Parliament to relieve them in any way from the agreement they have made.

In the absence of such an express stipulation as I have supposed, the company would be perfectly free to apply to Parliament to abrogate any agreement they had made, notwithstanding it was made in the most solemn manner, and bound them by every conceivable stipulation, except that one stipulation which I suppose absent, to treat it as final. If the company had grounds of public policy to submit for the purpose of inducing Parliament to abrogate the agreement, they would be at liberty to submit them.

But, I am supposing the agreement to contain an express stipulation that the company will not submit those grounds of public policy to Parliament; and the question to be,—not whether it may or may not be inconsistent with public policy to allow such an agreement to be entered into at all,—but whether this Court should interfere for the purpose of specifically performing the agreement, by preventing the application to Parliament.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v.
 THE NORTH
 WESTERN
 RAILWAY CO.
 —
Judgment.

If the application were made, one of two things would happen,—either the bill would be rejected, or it would be passed into an Act.

Suppose the bill to be rejected. It may be said, and it would be justly said, that there is great hardship in allowing parties to be exposed to the inconvenience and expense of opposing such a bill. And, to put a strong case of hardship, I will suppose a case between individuals:—A patentee is about to apply to Parliament for an extension of his patent, which he cannot obtain in the ordinary way. Other parties interested in the article to be manufactured, tell him he will never get his bill passed; but, inasmuch as, by applying to Parliament, he would put them to great expense, they will pay him 10,000*l.* down, if he agrees not to apply to Parliament. He agrees, and afterwards he does apply to Parliament. The case is a strong one against allowing the application to Parliament; but, I apprehend, assuming the contract to be valid, that, in the event of the bill being rejected, although the parties who had paid the money would have incurred precisely that very expense of opposition which it was the object of their agreement to avoid, the answer would be, that it is competent to them to recover in damages the expenses occasioned by the breach of contract; and, I apprehend, that even if such a case as that were to arise, there would be no ground for this Court to interfere.

1856.
 THE LANCASTER AND
 CARLISLE
 RAILWAY CO.
 v
 THE NORTH
 WESTERN
 RAILWAY CO.
 Judgment.

But, suppose the bill to pass. If Parliament thinks fit to pass the bill, it does so upon public grounds. It passes it with the knowledge that there existed, anterior to the bill, a contract, by which the applicants for the bill agreed, for certain good considerations, to abstain from applying to Parliament—a circumstance furnishing a weighty argument for inducing Parliament to reject the bill, and to leave the opponents, assuming the contract to be valid, to sue for damages for its breach. But if Parliament, notwithstanding all those grounds, considers it to be for the public benefit to pass the bill, observe the position in which the Plaintiffs seek to place this Court:—the Plaintiffs call upon this Court to interfere to prevent the Defendants from making out, to the satisfaction of Parliament, that it is for the public benefit that this agreement should be rescinded; they call upon this Court to interfere to prevent a public benefit from being secured (for it is only on the ground of its being for the public benefit, that Parliament will rescind the agreement).

It seems to me that it would be in the highest degree improper, for this Court to take upon itself to give this specific relief, when there is but one alternative that can possibly be presented, viz. the rejection or the passing of the bill:—the one event being such that the Plaintiffs would be secured by damages, the other such that the Court, supposing it so to interfere, would be preventing a public benefit.

In truth—and this argument was well put by Mr. Cairns—the Plaintiffs come here upon a case which I cannot try. The Defendants have reasons of public policy to urge, for the purpose of shewing that this agreement ought to be rescinded by Parliament, which it is impossible for the Court of Chancery to discuss. True, they cannot be heard here, nor will they be heard in Parliament, to say that, simply because it is convenient to them to break the agreement, therefore

it ought to be broken. But they may be heard to say there, as they have said here,—‘We shall be put to much less expense if we make the diverted line, we shall be put to very heavy expense if we do not; and that is a question affecting, not us only, but the public. Rescind this contract, and public traffic will be cheaper. Protect the Plaintiffs as much as you please in the bill you pass, but do not deprive the public of the benefit which will result from our application.’ Whether a benefit will result to the public, whether the question is one which ought to be submitted to Parliament, are questions which I cannot try. All I can consider is this:—the Defendants having entered into an agreement, the construction of which unquestionably is, that they will not apply to Parliament to make a particular line, shall I use the power of this Court to prevent their laying before Parliament a case which may, in the opinion of Parliament, be an ample justification for rescinding the whole agreement.

It seems to me, that this is certainly not the case which Lord *Cottenham* said it was difficult to conceive, but in which that power might be exercised. Lord *Cottenham* pointed there to questions simply of property; and his meaning is, that if the opposition to a bill be simply upon a question of property, the owner can sell his estate, and bind himself not to oppose the bill. This is not a question of property. It is a question whether a company, having formerly shewn, to the satisfaction of the Legislature, that it would then be for the public benefit to make a particular line of railway, shall be prevented from shewing, to the satisfaction of the Legislature, that it would now be more for the public benefit to make a diverted line.

I ought to notice an able argument of Mr. *Roundell Palmer*’s in *Heathcote v. The North Staffordshire Railway Company* (a), that there is no such distinction as that a

(a) 2 M’N. & G. 107.

1856.
THE LANCASTER AND
CARLISLE
RAILWAY CO.
v.
THE NORTH
WESTERN
RAILWAY CO.
Judgment.

1856.

THE LANCASTER AND
CARLISLE
RAILWAY CO.

v.

THE NORTH
WESTERN
RAILWAY CO.*Judgment.*

party may be restrained from opposing, but not from promoting an Act of Parliament; for, if so, he must first let the bill pass, and then promote an Act for its repeal. That consequence does not appear to me to be such a *reductio ad absurdum* as the argument represents it, because the party may promote the Act upon public grounds, and that circumstance would entitle him, in this Court, to a very different consideration.

Having come to these conclusions, I do not think it necessary to express an opinion on the question, whether the contract be void in itself on grounds of public policy. That question does not, to my mind, affect the question of costs, and I leave it to be determined, when occasion may require its determination. I have come to a clear conclusion, that the true construction of the agreement is that for which the Plaintiffs contend; and having come to that conclusion, although I refuse the motion, I cannot possibly refuse it with costs.

1855.

WALLGRAVE v. TEBBS.

Dec. 14th.

WILLIAM COLES, by his will in 1850, after giving certain pecuniary and charitable legacies, gave to the Defendants *Tebbs* and *Martin*, their executors, administrators, and assigns, as joint tenants, 12,000*l.*, free from legacy duty, to be paid within a month after his decease. And he directed that the said legacies for charitable purposes, and the said legacy to *Tebbs* and *Martin*, and the legacy duty payable in respect thereof, should be charged exclusively upon his property in the funds, in priority to his debts, and funeral and testamentary expenses. Then, after devising three houses in *Chelsea* to his executors, and their heirs, upon certain trusts, he devised all other his freehold lands and hereditaments in *Chelsea*, and a field at *Earl's Court* in *Kensington*, "unto and to the use of *Tebbs* and *Martin*, their heirs and assigns, for ever, as joint tenants." The will contained a residuary devise and bequest upon certain trusts

Charity—
Mortmain—
9 Geo. 2, c. 36
—*Secret Trust*
—7 Will. 4 &
1 Vict. c. 26.
Bequest of
personalty,
and devise of
lands, to De-
fendants as
joint tenants,
Bill to have
the bequest
and devise de-
clared void, as
having been
made upon
trust for and
to the intent
that Defend-
ants should
carry out cer-
tain charitable
purposes.)
Defendants,
by their an-
swer, admitted

that, since the testator's death, they had been informed and they believed, that, on the occasion of making his will, the testator determined on disposing of a part of his property to persons known to be interested in charitable and religious objects, and knowing one of them personally, and the other by character, he made to them the devise and bequest in the bill mentioned, not by way of or accompanied by any trust, but merely with that degree of confidence which a knowledge of character enables a donor to have as to the probable application or use of a gift; and that, at the testator's request, a letter had been written as a sketch for him to sign, but which was never in fact signed by the testator, expressing his confidence that Defendants would make use of the property in such a way as seemed best fitted to promote the glory of God and the welfare of their fellow sinners, and also expressing that it was the testator's intention to have appropriated the property to charitable purposes. The Defendants denied that they had ever had any communication with the testator about his will, or any of his intentions or wishes, with respect to the disposition of his property (denied that they had ever accepted or recognised, or acted on the letter or its contents; and said they had always believed) and insisted, that they were entitled to hold the property free from any trust whatsoever, (and to dispose of it in any way they thought proper) but admitted that they considered it would be proper for them, in a case in which benefits were left them by will under the circumstances stated, to use those benefits in a manner which would be consistent with the character and profession, in consideration of which they believed they were selected by the testator to receive such benefits:—*Held*, that, the stat. 7 Will. 4 & 1 Vict. c. 26, preventing the Court from looking at the letter in which the testator's intentions were expressed, and it not being shewn that, during the testator's life, there was any bargain or understanding between the testator and the Defendants, or any communication which could be construed into a trust, that they would apply the property in such a manner as to carry the testator's intentions into effect, the devise was valid, and the bill was dismissed with costs.

1855.
 WALLGRAVE
 v.
 TEBBS.
 —
Statement.

for the benefit of the infant children of a nephew and niece of the testator.

After the testator's death, a bill was filed on behalf of the infants, to which *Tebbs*, *Martin*, the testator's nephew and heir at law, and the executors, one of whom was a *Mr. Graham*, were Defendants, stating, that the legacy of 12,000*l.*, and the hereditaments in the will mentioned to be devised to *Tebbs* and *Martin*, were not given and devised to them for their own benefit, but upon trust for and to the intent that they should carry out certain charitable purposes, and praying that it might be declared that the said bequest and devise to *Tebbs* and *Martin* were void, and that the Plaintiffs were beneficially entitled thereto.

The Defendants *Tebbs* and *Martin*, by their answer, stated that neither of them ever had any communication with the testator about his will, or any of his intentions or wishes with respect to the disposition of his property. They then proceeded to answer as follows:—"The Defendant *Graham* has informed us, and we believe, that he prepared the will of the testator; that the testator had, in his lifetime, contemplated devoting some part of his property towards building and endowing a church and almshouses, and asked him, *Graham*, to undertake some trust for that purpose, which he, *Graham*, declined to do; that, on the occasion of making his will, the testator, having amply provided for his relations, determined on disposing of a part of his property to persons known to be interested in charitable and religious objects, and, knowing one of us personally and the other by character, he made to us the devise and bequest in the bill mentioned, not by way of or accompanied by any trust, but merely with that degree of confidence which a knowledge of character enables a donor to have, as to the probable application or use of a gift. *Graham* further informed us, and we believe, that he, *Graham*, suggested to the testator, that

the testator should make to us some communication of the motives which influenced him in selecting us for these benefits, and that he, *Graham*, being requested by the testator so to do, wrote the letter referred to in the bill, as a sketch for the testator to consider, and to sign if he approved of it, but that the testator never signed the same, nor was the same completed, and the paper was first shewn to us about the 6th of February, 1854, by *Graham*."

1855.
WALLGRAVE
v.
TEBBS.
—
Statement.

The letter referred to was as follows :—

" Dear Sir,—1850. You know what my wishes were with regard to the *Chelsea* freeholds and the 12,000*l.*, and the difficulties in my way of doing what I wished. I am confident, from the christian characters of Mr. *Tebbs* and Mr. *Martin*, that, if they are not able to do what I would have done, they will make use of what I have given them in such a way as seems to them best fitted to promote the glory of God, and the welfare of our fellow sinners. I trust, however, that they will keep — hundred pounds for themselves. You know that it was my intention to have built a church or chapel in my field behind *Smith Street*, and to have endowed it out of the *Chelsea* property; and to have built ten or twelve almshouses at *Earl's Court*, in the field behind the terrace, with the money, and provided by weekly payments for the living there of poor married couples or widows."

The answer proceeded thus :—

" We have never accepted or recognised or acted on the paper or its contents; and we have always believed, and we submit and insist, that we are entitled to hold the devise and bequest in the will mentioned, free from any trust whatsoever, and that we are entitled to dispose of the same in any way that we think proper."

The Defendants denied that they, or either of them, had accepted the alleged trusts; and after denying that they had

1855.
 WALLGRAVE
 v.
 TEBBS.
 —
Statement.

determined to appropriate the property, or any part thereof, for the specific purposes charged in the bill, or for any such or the like purpose,—saying that, on the contrary, they had determined nothing on the subject, and had been and were prevented doing so by this litigation, they proceeded to answer as follows:—“ At the same time we say and admit, that we consider it would be proper for us, in a case in which benefits were left us by will, under the circumstances herein stated (which we believe to be the true circumstances of the case), to use those benefits in a manner which will be consistent with the character and profession, in consideration of which we believe we were selected by the testator to receive such benefits. And we admit that we have to and between each other, by letter and in conversation, and with other persons, discussed and considered various schemes and plans for expending the property in question in such a manner as aforesaid; and, among other schemes, we have considered and discussed the expediency of building a church in *Chelsea*, or elsewhere, but we have come to no determination, and consider ourselves entirely free to use the property for that or any other purpose.” And, save as aforesaid, they denied that they intended to apply the property to any charitable purpose as alleged in the bill, or pursuant to any wish of the testator.

The paper-writing referred to in the bill and answer was never signed by the testator. It was found among other papers in his possession at the time of his decease, and which related to his will.

The Defendant *Martin*, in a letter to *Tebbs*, referring to the claim of the testator's heir at law, wrote as follows:—“ The testator has done what he saw fit for his family, and any deduction from the fund by us for him defeats our testator's clearly expressed intention.”

The cause now came on to be heard upon motion for a decree.

1855.
WALSHGRAVE
v.
TEBBS.
Argument.

Mr. *Rolt*, Q. C., and Mr. *G. L. Russell*, for the Plaintiffs.
—The bequest and devise to the Defendants *Tebbs* and *Martin* are void, as having been given and devised to them not for their own benefit, but upon trust for and to the intent that they should carry out the charitable objects of the testator.

That they were so given is clear, first, from the letter found among the testator's papers, and which, although not attested or even signed, is admissible, to shew with what intent the gift was made; and, secondly, from the admissions on the record, the Defendants, by their answer, admitting that such was the intention of the testator in making the gift, and in selecting them as the donees; that such his intention was communicated to them; and, in effect, that they consider themselves bound in conscience to use the benefits in question "in a manner which will be consistent with the character and profession in consideration of which they believe they were selected by the testator to receive those benefits;" in other words, that they are bound in conscience to apply them according to the testator's intention.

A testator cannot place persons in a position in which they must either violate the highest obligation by committing a breach of trust, or by a performance of the trust must violate the law. Had the object of this gift been not merely *malum prohibitum*, but *malum in se*,—e. g. the carrying out of blasphemous or obscene purposes, the question could admit of but one answer.

[The VICE-CHANCELLOR.—Can you put it higher than an expression of an anxious desire on the part of the testator to have his design carried out?]

1855.
 WILLOUGHBY
 v.
 TEBBS.
 —
Argument.

He has not merely expressed his desire, he has imposed a moral obligation, which, had the law allowed it, he would have rendered absolutely binding; but, as the law did not allow of that, he has selected for his purpose persons of peculiarly tender conscience, whom he binds quite as absolutely by the means he has adopted. The law will not allow itself to be thus stultified.

[The VICE-CHANCELLOR.—Your argument would go to this extent, that a testator may not give property of this description to persons who are charitably disposed, and who, he expects, will spend it as he would have done himself.]

It is not necessary to carry our argument to that extent, for here we have an admission on the record, that the Defendants consider it would be improper to apply what the testator has devised in any manner which would be inconsistent with the character and profession in consideration of which they believe they were selected by the testator as devisees. In other words, there is a clear admission on the record, that their consciences are bound to apply the property in question in that one way. Any other, as one of the Defendants elsewhere expresses it, “would defeat the clearly expressed intention of our testator.”

[The VICE-CHANCELLOR.—Is it not conceivable that the law may have left it open to testators, at the risk of the attempt proving altogether abortive by reason of some accident, e. g. the bankruptcy, lunacy, or sudden death of the donees, or even by reason of their proving dishonest, to attempt to do what the law, at the same time, prevents being done with perfect certainty?]

The law considers that such risks will be looked upon, as in fact they would be looked upon by testators, as contingencies too remote to be regarded; and that no mere risk

will be sufficient to discourage testators from attempting to do that which it forbids. It therefore forbids the attempt.

1855.
 WALLGRAVE
 v.
 TEBBS.
 —
Argument.

Then, as regards authority,—upon the authorities the gift is clearly void. The mere admission by the Defendants of an unattested memorandum, shewing a charitable intention on the part of the testator, is sufficient to render the gift void: *Muckleston v. Brown* (a), and an unreported decision there cited of Sir *Thomas Sewell's*, and *Boson v. Statham* (b). The question, when first the Defendants became aware of such intention on the part of the testator,—whether they became aware of it before or only after the testator's death,—is immaterial. The material circumstance is this, that the devisee considers the intention binding in honor,—that he is not at liberty to apply the property to purposes foreign to such intention. "The Statute of Mortmain meant to prevent honorary trusts or devises for charities, quâcunque arte vel ingenio; and the honorary trust infects the will as much as if it were declared in the most solemn manner:" per Lord *Northington*, C., in *Boson v. Statham* (c). In that case the devisee did not admit that he considered the intention to be binding; but the mere circumstance that he abstained from saying that it was not so binding, was held sufficient to avoid the devise (d).

[They cited also *Bishop v. Talbot* (e), *Longstaff v. Renison* (f), *Russell v. Jackson* (g).]

Mr. *James*, Q. C., and Mr. *G. H. Money*, for the heir-at-law, cited in support of the same contention, *Way v. East* (h), *Attorney-General v. Poulden* (i), where there was no trust

(a) 6 Ves. 67, 68.

(b) 1 Eden, 508.

(c) Id. 514.

(d) Id. 509.

(e) MS. at the Rolls, 6 Feb.

1772, mentioned 6 Ves. 60.

(f) 1 Drew. 28.

(g) 10 Hare, 204, 211.

(h) 2 Drew. 44.

(i) 8 Sim. 472.

1855.
 WALLGRAVE
 v.
 TEBBS.
 —
Argument.

which this Court could have enforced, and *Lomax v. Ripley* (a); arguing, that, if it be shewn that a testator, in making a devise, desired to evade the Statute of Mortmain, and that the devisee has accepted the devised property, and has not disclaimed an intention to carry out the testator's desire, the Court would declare the gift void: otherwise, to evade the statute would be a mere matter of machinery, especially in the present day, when the honor of persons selected for the promotion of charitable objects is more to be relied upon than formerly. Suppose a gift of this description to the individuals constituting the governing body of a hospital, or to the trustees of any religious society, nominatim, whether accompanied or not by a communication like the present, of the testator's intention in making the gift:—would not the property, as a matter of course, be applied for the purposes of the institution?

[The VICE-CHANCELLOR, at the close of this part of the argument, said, he quite agreed with an observation made by Lord Justice *Turner*, as Vice-Chancellor, in *Russell v. Jackson*, that the duty of a devisee under the circumstances stated was to throw up the property, it being very improper in a testator to endeavour to evade the law, and very improper in the devisee to assist him in doing so.]

Mr. *Wickens*, for the Attorney-General, took no part in the argument.

Mr. *George Simpson* for the executors.

Mr. *Willcock* and Mr. *Cairns* for the Defendants, *Tebbs* and *Martin*, were not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

I have anxiously considered this case, and the more so because I do not find that there is any authority by which it is decided. In *Russell v. Jackson* (a) Lord Justice *Turner*, then Vice-Chancellor, expressly guards himself from being supposed to give any opinion upon the question now raised (b).

1855.
WALLGRAVE
v.
TEBBS.
Judgment.

But, although I do not find any decision in point, I find in *Addlington v. Cann* (c) a clear indication of the opinion which Lord *Hardwicke* would have entertained upon a question like the present; and in *Muckleston v. Brown* (d) I find an equally clear indication that the same view would have been taken by Lord *Eldon*. And I am satisfied that I ought not to be the first to overstep the clear line which separates mere trusts from devises and bequests, which, on the face of the will, are absolute, but which are alleged to have been in fact given with an intention to evade the statute.

(Where a person, knowing that a testator in making a disposition in his favor intends it to be applied for purposes other than his own benefit, either expressly promises, or by silence implies, that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is in effect a case of trust; and, in such a case, the Court will not allow the devisee to set up the Statute of Frauds—or rather (the Statute of Wills,) by which the Statute of Frauds is now, in this respect, superseded; and for this reason:—(the devisee by his conduct has induced the testator to leave him the property) and, as Lord Justice *Turner* says in *Russell v. Jackson*, no one can doubt, that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition

(a) 10 Hare, 204.

(b) Id. 210.

(c) 3 Atk. 141.

(d) 6 Ves. 52.

1855.
WALIGRAVE
v.
TEBBS.
Judgment.

in his favor would not have been found in the will (a). But in this the Court does not violate the spirit of the statute: but for the same end, namely, prevention of fraud, it engrafts the trust on the devise, by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it.

But the question here is totally different. (Here there has been no such promise or undertaking on the part of the devisees.) Here the devisees knew nothing of the testator's intention until after his death. That the testator desired, and was most anxious to have his intentions carried out, is clear. But, it is equally clear, that he has suppressed everything illegal. He has abstained from creating, either by his will or otherwise, any trust upon which this Court can possibly fix. Upon the face of the will, the parties take indisputably for their own benefit. Can I possibly hold that the gift is void? If I knew perfectly well that a testator in making me a bequest, absolute on the face of the will, intended it to be applied for the benefit of a natural child, of whom he was not known to be the father, provided that intention had not been communicated to me during the testator's life, the validity of the bequest as an absolute bequest to me could not be questioned.

It was argued, that, if the object of the gift had been not merely *malum prohibitum*, but *malum in se*, the devise must necessarily have been void. The answer is the same: the devise would have been void if the intention with which it was made had been known to the devisees during the life of the testator, and if they, by their conduct, had induced him to believe that they meant to carry that intention into effect.

The Court is now asked to do what as yet it has never done:—for the sake of upholding the Statute of Mortmain,

(a) 10 Hare, 211, 212.

the Court is asked, as Lord *Hardwicke* expresses it, "to break in upon the Statute of Frauds," or rather the Statute of Wills, "by admitting parol evidence to prove that the testator intended his estate for charitable uses" (a). If this can be allowed, if, in any case, the statute may be broken through, where is the Court to stop? Why is it to stop at the Statute of Mortmain? Every bequest might be opened upon a suggestion that there was some secret purpose or intention in the breast of the testator, which this Court would consider illegal. Any individual may be deprived of a legacy by parol evidence that the testator intended it for some one else. By upholding the Statute of Wills, the Court would adopt a course simple and clear. By upholding the Statute of Mortmain at the expense of the Statute of Wills—by treating the Statute of Mortmain as taking all such cases as this out of the Statute of Wills, and as intended to introduce parol evidence, the Court, as Lord *Hardwicke* has said, "would do more mischief, by laying the foundation of a great deal of perjury, than it could possibly do good in any other respect whatsoever" (b).

1855.
WALLGRAVE
v.
TEBBS.
Judgment.

As this question has been argued at great length, I will consider whether any of the cases cited have taken a different view.

In *Boson v. Statham* (c), the ground upon which the devise was held void is thus stated by Lord *Northington*, C.; he says: "I will speak openly, and declare my opinion generally, that a writing, signed by the party who has power to make the trust, declaring a trust upon the will, is good, though such writing be not attested by three witnesses, according to the solemnities of the Statute of Frauds(d)." And, if so, there was an end of that case. But it is impossible, consistently with other authorities, to follow that decision.

(a) Per Lord *Hardwicke* in *Adlington v. Cann*, 3 Atk. 119.

(b) *Id.* 151.

(c) 1 Eden, 508.

(d) *Id.* 511.

1855.
 WALLGRAVE
 v.
 TEBBS.
 Judgment.

In *Muckleston v. Brown* (a) Lord *Eldon* examines Lord *Hardwicke's* decision in *Addlington v. Cann*, with the additional light thrown upon it by Sir *Thomas Parker* in *The Attorney-General v. Duplessis* (b); and he also mentions a decision of Sir *Thomas Sewell*, in an unreported case, the name of which does not appear: and, at first sight, Lord *Eldon's* remarks may seem to favour the contention, that a mere admission by the devisees that the testator intended the property for charitable purposes, is sufficient to render the devise void. But where he says (c), that, in *Addlington v. Cann*, the Defendants must have answered the charge "that they knew the secret trust" &c., it is clear that, by a knowledge of the secret trust, Lord *Eldon* meant a knowledge *during the life of the testator*,—a knowledge which would make the admission of it an admission of a trust, an admission of something "applying," as he expresses it, "to the conscience of the Defendants" (d). And so, where he says of the unreported case before Sir *Thomas Sewell*, that it is an authority in point of law, that "if there were *an admission* he would execute the trust," he plainly means again, an admission that the devisees were aware *during the testator's life* that he intended the property for charitable purposes. Lord *Eldon* could not have doubted that the Defendants admitted the fact of such intention on the part of the testator, he had himself just stated that, by their

(a) 6 Ves. 52, 67, 68.

(b) Park. 144, 160.

(c) 6 Ves. 67.

(d) In *Stickland v. Aldridge*, 9 Ves. 519, Lord *Eldon* makes this observation:—"In *Addlington v. Cann* Lord *Hardwicke* was clearly of opinion, that, there being nothing in the will attaching a trust, if the testator afterwards by an unattested paper, expressing his own intention, *not com-*

municated, said, the purpose was to devote the estate to a charitable purpose, the devisee might object that he had taken under a will well executed; and the subsequent paper was not well executed. But that is perfectly different from the case of a deviser expressing in the paper a trust, which *by contract with the devisee* led to that devise."

further answer, the Defendants admitted that there was a memorandum which certainly pointed to a disposition of the real estate to charitable purposes ; but what he meant was, that there was no admission that they knew of such intention during the testator's life—no admission of any knowledge which could affect their consciences.

1855.
WALLGRAVE
v.
TEBBS.
—
Judgment.

So, in *Way v. East*(a), although there was no evidence of any specific agreement between the parties, there was evidence of conduct shewing an intention not only in the grantor, but in one of the grantees, to evade the statute;—shewing, in the words of the Vice-Chancellor, “that there did exist at the time of the execution of the deed, and during all the subsequent time, a design among the parties to the deed that the payment should not commence till the death of the grantor” (b). And so in the *Attorney-General v. Poulden* (c), the ground upon which the Court held the conveyance void was, that the circumstances of the case were such as, in the opinion of this Court, to support the inference of a secret trust for the grantor.

It is clear, therefore, that, excepting *Boson v. Statham*, which cannot now be followed as a binding decision, none of the authorities which have been cited sustain the contention that the devise, in the present case, is void.

On the other hand, although I find no authority expressly deciding that such a devise is valid, I find a clear leaning both in the judgment of Lord *Hardwicke* and in that of Lord *Eldon*, in favour of that conclusion. In the concluding passage of his judgment in *Muckleston v. Brown* (d), in which Lord *Eldon* states the principle upon which devises, such as that which the bill in that case averred, should be

(a) 2 Drew. 44.
(b) Id. 67.

(c) 8 Sim. 472.
(d) 6 Ves. 69.

1855.
WALLGRAVE
v.
TEBBS.
Judgment.

held to be void, he makes everything turn upon the existence of an "agreement," a "bargain between the testator and those who are apparently to take under his will,"—a communication between the parties during the testator's life, which can be construed into a trust; failing that, the devise is valid. The question is simply whether there is a trust well and effectually created (a).

In *Russell v. Jackson* (b) there was a clear trust, and it was unnecessary to decide what would have been the consequence if the testator's intention had not been communicated to either of the devisees. To one of them that intention was clearly communicated, and upon that ground the decision rested. "Whether *Thomas* was present or not," says Lord Justice *Turner*, "the evidence is, I think, clear that the gift would not have been made to him but for the promise, given by *William*, that the intentions of the testator should be carried into effect; and I fully agree to the principles laid down in *Huguenin v. Baseley*, followed in many other cases, that no person can claim an interest under a fraud committed by another. However innocent the party may be, if the original transaction is tainted with fraud, that taint runs through the derivative interests, and prevents any party from claiming under it" (c).

In the present case (there is no trust created) It is impossible for the Court to look upon a document which is excluded by the statute; and, such evidence being excluded, the case is reduced to one in which the testator has relied solely on the honor of the devisees, who, as far as this Court is concerned, are left perfectly at liberty to apply the property to their own purposes. The same remark would apply

(a) See further as to the views of Lord *Hardwicke* and Lord *Ellenborough* on this subject, *Stickland v. Aldridge*, 9 Ves. 519.
(b) 10 Hare, 204.
(c) *Id.* 212.

to all the cases of gifts to the trustees (nominatim) of hospitals, or religious societies, which were suggested in the argument for the heir-at-law.

1855.
WALLGRAVE
v.
TEBBS.
Judgment.

I should have noticed one more passage in Lord *Hardwicke's* judgment in *Addlington v. Cann*, in which he says, "very little inconvenience can arise from my determination; for this case cannot be liable to great objections, as a general case, because the instances of trustees abusing the trust of charity are so frequent, that they are a sufficient warning to reasonable men, not to leave their estates under such uncertainty, as to put them absolutely under a person's power, and then trust to his generosity for the disposing of them in charity" (a). In reference to this remark it was argued, and it may be the case, though I doubt it, that, in the present day, the standard of morality among trustees, and persons generally, is higher than it was in the time of Lord *Hardwicke*; but, be that as it may, the argument does not reach what Lord *Hardwicke* might have added, that a testator so disposing of his property would still be compelled, even assuming the integrity of the donees, to trust to a variety of accidental circumstances, failing any of which his intention would be frustrated. Lunacy, insolvency, sudden death of the devisee, are all accidents to which the gift is exposed, and which place the accomplishment of the testator's design in jeopardy.

But the question, whether such considerations are sufficiently strong to deter testators from thus disposing of their property, is one which ought not to affect my decision. If they are not,—if it be necessary to enact a further and more rigid Statute of Mortmain, let it be enacted. It is not for this Court to attempt it.

Upon the face of this will (the devisees are entitled to the property in question for their own absolute benefit.) The Statute prevents the Court from looking at the paper-writing

(a) Per Lord *Hardwicke* in *Addlington v. Cann*, 3 Atk. 153.

1855.
 WALLGRAVE
 v.
 TERRES.
 Judgment.

in which the testator's intentions are expressed; and the parties seeking to avoid the devise have failed to shew that, during the testator's lifetime, there was any bargain or understanding between the testator and the devisees, or any communication which could be construed into a trust, that they would apply the property in such a manner as to carry the testator's intentions into effect. The devise, therefore, is a valid devise, and the bill must be dismissed.

If no case similar to the present has yet been agitated, it is because the attempt has hitherto been looked upon as hopeless. I must, therefore, dismiss the bill with costs.

See *Tee v. Ferris*, reported below, p. 357.

1856.
 Feb. 16th.

IN RE THE TRUSTS OF ANTHONY BIRCH'S LEGACY UNDER SARAH BISSELL'S WILL.

AND

IN RE THE ACT 10 & 11 VICT. c. 96.

Bankruptcy—
 6 Geo. 4, c. 16,
 s. 127—12 &
 13 Vict. c. 106,
 ss. 1 and 4.

By the Act 12 & 13 Vict. c. 106, the Legislature did not intend to affect the then future rights of any person who had acquired rights by virtue of any fiat under any Act then in force.

PETITION for payment of 213*l.* 3*s.* 8*d.* bequeathed to *Anthony Birch* by the will of *Sarah Bissell*, and paid into Court under the 10 & 11 Vict. c. 96, by the executors of that will.

In August, 1838, a fiat in bankruptcy issued against *Birch*. In March, 1839, he obtained his certificate. His estate did not pay 15*s.* in the pound.

In May, 1846, a second fiat in bankruptcy issued against *Birch*. In November, 1846, he obtained his certificate un-

The estate of a bankrupt, on his second bankruptcy in 1846, was not sufficient to pay 15*s.* in the pound. The assignees allowed him to carry on his trade, and contract debts, for eight years, at the expiration of which a legacy was bequeathed to him. This the assignees claimed, serving the executors, two months after the death of the testatrix, with notice of their claim:—*Held*,

First, that their right, under the 6 Geo. 4, c. 16, s. 127, to the legacy in question, was a right protected by the saving clause in the 4th section of the 12 & 13 Vict. c. 106; and

Secondly, that they had so conducted themselves that such right could not be taken from them.

der the second fiat. On this, as on the former occasion, his estate did not pay 15s. in the pound (a).

On the 13th of September, 1854, *Sarah Bissell* died, having by her will bequeathed to *Birch* the legacy in question.

On the 16th of November, 1854, the assignees under the second fiat served a notice of their claim to the legacy upon the executors.

(a) By the Act 6 Geo. 4, c. 16, s. 127, it is enacted, "That if any person who shall have been so discharged by such certificate as aforesaid, or who shall have compounded with his creditors, or who shall have been discharged by any insolvent Act, shall be or become bankrupt, and have obtained or shall hereafter obtain such certificate as aforesaid, unless his estate shall produce (after all charges) sufficient to pay every creditor under the commission 15s. in the pound, such certificate shall only protect his person from arrest and imprisonment, but *his future estate and effects* (except his tools of trade and necessary household furniture, and the wearing apparel of himself, his wife and children), *shall vest in the assignees* under the said commission, who shall be entitled to seize the same in like manner as they might have seized property of which such bankrupt was possessed at the issuing the commission."

By the 1st section of the 12 & 13 Vict. c. 106—"The Bankrupt Law Consolidation Act, 1849," the whole of the 6 Geo. 4, c. 16, is repealed from and after the 11th of October, 1849, with this exception (inter alia), viz. "Except also so far as may be neces-

sary for the purpose of supporting any proceedings taken or to be taken under and after the commencement of this Act, upon any trading, act of bankruptcy, petitioning creditor's debt, fiat, or other proceeding in bankruptcy before the commencement of this Act."

The 4th section of the Act of 1849 contains this further proviso:—"Nothing in this Act contained shall render invalid any proceedings in bankruptcy, or any fiat in bankruptcy, or any petition for arrangement, depending at the commencement of this Act, or any proceedings which may have been instituted or taken under or by virtue of such bankruptcy, fiat, or petition, or lessen or affect any right, title, claim, demand, or remedy which any person now has or hereafter may have under or by virtue thereof, or lessen or affect any right, title, claim, demand, or remedy which any person now has or hereafter may have upon or against any bankrupt against whom any fiat has or shall have been issued, or against any such trader who may or shall have presented such petition, except as in this Act is hereafter specially provided."

1856.

In re
BIRCH'S LE-
GACY UNDER
BISSELL'S
WILL.

Statement.

1856.
 In re
 BIRCH'S LE-
 GACY UNDER
 BISSELL'S
 WILL.
 Statement.

On the 28th of September, 1855, *Birch* was discharged from custody under the Act for the Relief of Insolvent Debtors. And, on the 6th of October following, by an order of the Court for Relief of Insolvent Debtors, the petitioner was appointed assignee of his estate and effects.

The petitioner, by an affidavit in support of his petition, deposed, that the assignees under the second fiat had not, since the year 1846, interfered with any of the property of *Birch* thereafter acquired, but had permitted him to carry on his trade of a grocer, and to contract debts with the petitioner and others.

Argument.

Mr. *De Gez* for the petitioner.

The right to this legacy is in the petitioner as *Birch's* assignee in insolvency.

By the Bankrupt Law Consolidation Act, 1849 (*a*), the contingent right which, but for the passing of that Act, the assignees under the second fiat might have had by virtue of the 6 Geo. 4, c. 16, s. 127, to the future estate and effects of the bankrupt, upon the ground that his estate, on his second bankruptcy, was not sufficient to pay 15s. in the pound, was prevented from arising, the statute of Geo. 4 being wholly repealed by the Act of 1849 (*b*). A right could not vest in the assignees before it existed in the bankrupt; and, unless there were, when the right accrued to the bankrupt, a law in force (which here there was not) to take it from him and give it to the assignees, it continued to belong to him: *Herbert v. Sayer* (*c*).

And, independently of the Act of 1849, the assignees under the second fiat have forfeited all rights they might have had, by their own laches. By allowing *Birch* to carry on

(*a*) 12 & 13 Vict. c. 106. (*b*) *Id.* s. 1; compare Sched. A. to the Act.
 (*c*) 5 Q. B. 976.

his trade for eight years, they have treated him as a restored person: *Troughton v. Gitley* (a). They might have seized his effects: *Tucker v. Hernaman* (b).

Mr. *Cracknall* for the assignees under the second fiat.

First, the Act 6 Geo. 4, c. 16, is not absolutely repealed by the Act of 1849 (c); and the present case is within the exception contained in the 1st and 4th sections of the latter Act: *Ex parte Higginson* (d). By the 4th section of the Act of 1849, nothing therein contained is to lessen or affect any right which any person thereafter might have under or by virtue of any fiat then depending.

Secondly, there has been no laches. To seize from a bankrupt, week by week, what profit he is making, would be endless; and here it is not shewn that there was anything to seize. Two months after the legacy accrued, notice of the claim under the second fiat was given to the executors: *Butler v. Hobson* (e), *Ex parte Grimstead* (f).

Mr. *Bird* for the executors.

Mr. *Speed* for *Anthony Birch*.

Mr. *De Gez* in reply.—To support the contention of the assignees under the second fiat, the words in the 4th section of the recent Act should have been “any right &c. which any person hereafter *might have had but for the passing of this Act.*”

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In regard to the second point, I have no doubt that this case is not within that of *Troughton v. Gitley*. The assignees under the second fiat allowed the bankrupt to trade for eight years, but, two months after the bequest of the legacy now in question, they gave notice of their claim to

1856.
In re
BIRCH'S LE-
GACY UNDER
BISSELL'S
WILL.
Argument.

Judgment.

(a) Amb. 630.

(b) 4 De G., M’N. & G. 395.

(c) 12 & 13 Vict. c. 106.

(d) 1 De G., M’N. & G. 204.

(e) 4 Bing. N. C. 290.

(f) 1 De G. 72.

1856.

In re
BIRCH'S LE-
GACY UNDER
BISSELL'S
WILL.

—
Judgment.

the executors. By so doing, they put themselves in the position of persons who had actually seized the bankrupt's effects. Against the bankrupt, therefore, their claim was perfectly good; and it is equally good against his creditors, and against the petitioner, as representing such creditors.

Then, as regards the Act of 1849 (*a*), it is clear, from the 1st and 4th sections, that the Legislature did not intend by that Act to affect the then future rights of any person who had acquired rights by virtue of any fiat under any Act then in force. The saving clauses in those sections seem to me to express this almost in so many words. The 1st section saves the Acts to be repealed, and among others this Act of the 6 Geo. 4, c. 16, so far as may be necessary for the purpose of supporting proceedings to be taken upon any fiat in existence before the commencement of the Act of 1849. And the 4th section of the Act of 1849 provides, that nothing in that Act shall render invalid any fiat in bankruptcy depending at the commencement of the Act, "or lessen or affect any right, title, claim, demand, or remedy which any person now has, or hereafter may have, under or by virtue thereof." These words are the largest which could possibly have been used, and appear to me to contemplate the very case, that, under the old Acts, there were not only existing but future and contingent rights to be protected, and, among others, rights precisely similar to the right now claimed by the assignees under the second fiat. And it is impossible, consistently with this clause, to hold that the right in question ceased, as contended on behalf of the petitioner.

I am, therefore, of opinion that, by the Act 12 & 13 Vict. c. 106, the right of the assignees under the second fiat to the legacy in question was saved; and they have so conducted themselves that it cannot be taken from them.

There must be a declaration to this effect, and I must order the fund to be paid to them accordingly.

(*a*) 12 & 13 Vict. c. 106.

1856.

EIDSFORTH v. ARMSTEAD (a).

Jan. 24th &
31st.

*Wills—Power
of Sale.*

THOMAS LODGE, by his will, dated 1833, charged his debts, funeral, and testamentary expenses on his real and personal estate; and then devised unto *Bower and Bainbridge*, their heirs, executors, administrators, and assigns, all his hereditaments situate within the parishes of *Nether Kellett, &c.*, and all other his real estate, upon trust for his wife *Sarah Lodge*, for life; and, after her decease, upon trust, that his trustees and the survivor of them, and the heirs, executors, and administrators of such survivor, should demise the said hereditaments, and pay the rents to his daughter *Hannah Toulmin* for her life, for her separate use, without power of anticipation; and, after her decease, to the use of such person or persons and for such estate or estates as she, whether covert or sole, by her last will and testament should appoint; and, in default of such appointment, to the use of the right heirs of his said daughter for ever. And the testator did thereby further charge the said messuages, lands, and tenements with the payment of 700*l.* unto his granddaughter *Mary Lodge*, to be paid to her when she should attain the age of twenty-one years. And he appointed *Bower, Bainbridge*, and *Sarah Lodge*, executors and executrix of his will.

Where a testator has charged his real estate with the payment of a sum of money, he is to be taken to have given an implied power of sale to some one. The donee of the power is to be ascertained from the whole of the will.

A testator devised his real estate to the use of *A. and B.*, during the life of *C.* (a married woman), upon trust for her, with remainder to the use of the right heirs of *C.*, and charged such real estate with the payment of 700*l.* to *D.* :—*Held*, that *A. and B.* had a power of sale during the life of *C.*

The testator died in 1834, and *Sarah Lodge* died in 1839. Both trustees accepted the trusts of the will. *Bower* survived his co-trustee, and died in 1845, having devised his trust estates to *Armstead*, and made him his executor; and *Armstead* proved the will.

By a deed, dated 1853, the charge of 700*l.* created by the will was assigned to the Plaintiffs; and *Armstead* and *Mrs.*

(a) Ex relatione *Mr. B. L. Chapman.*

VOL. II.

Z

K. J.

1856.
 EIDSFORTH
 v.
 ARMSTEAD.
 Statement.

Toulmin conveyed some real estate comprised in the general devise to the Plaintiffs, by way of mortgage, to secure the 700*l.* and interest.

A claim was then filed by the Plaintiffs against *Armstead* and *Mrs. Toulmin*, stating the mortgage of 1853, and claiming payment of the 700*l.*, interest and costs; and that, in default of payment, the mortgaged premises might be sold.

By a decree made at the hearing of the claim, the mortgaged property was ordered to be sold. The property was put up for sale, and *Mr. Cole* became the purchaser.

Mr. Cole objected to the title, on the ground that there was no authority given by the will under which the property could be sold, and that the Court had not jurisdiction to order a sale. It was agreed between the Plaintiffs and *Mr. Cole*, that this question (being the only question in dispute on the title) should be submitted to the Court, on a motion that the purchaser should pay his purchase-money into Court.

Argument.

Mr. Osborne, for the motion, contended, that there was an implied power given to the trustees by the will, and cited *Shaw v. Borrer* (a), *Ball v. Harris* (b).

Mr. B. L. Chapman for the purchaser.—The estate is here devised to the trustees for the lives of *Mrs. Lodge* and *Mrs. Toulmin* only; and, after the death of the survivor of *Mrs. Lodge* and *Mrs. Toulmin*, the estate of the trustees ends. The legal and equitable estate in the property, after the death of the survivor of *Mrs. Lodge* and *Mrs. Toulmin*, will go to the person who may have been appointed by the

(a) 1 Keen, 559.

(b) 4 My. & Cr. 284.

will of Mrs. *Toulmin*; or, in default of such appointment, to the person who may be her heir-at-law after her death. The person then to take after Mrs. *Toulmin's* death cannot now be ascertained. There is no express authority given by the will to sell. It has been contended that there is an implied power on the authority of the cases of *Ball v. Harris* and *Shaw v. Borrer*. In those cases, however, there was a devise to the trustees *in fee*; so that they had the whole legal estate. Here the trustees have only the legal estate during the life of the tenant for life. If there is no authority given by the will, the Court has no authority to sell, nor as to bind persons not even ascertained: *Heming v. Archer (a)*.

1856.
KIDSFORTH
v.
ARMSTEAD.
Argument.

Judgment reserved.

Mr. *Osborne* afterwards cited the case of *Robinson v. Water (b)*.

CHANCELLOR SIR W. PAGE WOOD:—

The testator, having charged his real estate with a sum of money, must be taken to have given an implied power of sale to some person to raise the sum required; and I will so hold on the authority of the case last cited by Mr. *Borne*.

Jan. 31st.
Judgment.

The donee of the power must be ascertained, in each case, from the whole of the will.

In this case, it appears to me that the persons who were intended to sell, were the trustees.

The purchaser will, therefore, be ordered to pay his money into Court according to the motion.

(a) 9 Beav. 366.

(b) 17 Beav. 592; S. C., affirmed on appeal, 5 De G., M. & G. 272.

1856.

Feb. 15th,
16th, & 20th.

RODDAM v. MORLEY.

Bond—Statutes of Limitation—Payment of Interest—Tenant for Life of Obligor's Real Estate.

A bond debt, by which the heir is bound, is not a debt "charged upon or payable out of" land within sect. 40 of 3 & 4 Will. 4, c. 27; but an action upon it is simply a personal action, and is barred by 3 & 4 Will. 4, c. 42.

Consequently it is barred by the lapse of twenty years, unless such an acknowledgment, by writing or part payment, has been in the meantime made by the party liable, or his agent, as is required by the 5th section of the latter statute.

This section reserves the right of action against the person

making such acknowledgment only, and does not simply rebut the presumption of satisfaction and leave the bond in force, as it would have been under the old law when such presumption was rebutted. Therefore, payment of interest within twenty years by the tenant for life of the obligor's real estate, did not keep alive a right of action on the bond against persons entitled to such real estate in remainder.

JOSIAS MORLEY executed his bond in May, 1826, and thereby bound himself, his heirs, executors, and administrators in a penal sum, conditioned to be void if he, his heirs, executors, or administrators should pay to *John Brown*, his executors, administrators, or assigns, the sum of 300*l.*, with interest, on the 29th day of November then next ensuing.

Josias Morley, by his will, dated the 31st of January, 1827, devised his estate at *Marrick*, in the county of *York*, to the Defendant *Morley*, for a term of 500 years, and subject thereto to the use of the testator's son *Francis Morley* (now deceased) for his life, with remainder to trustees to preserve contingent remainders, with remainder to his first and other sons in tail general, with divers remainder over; and the testator declared that the said term of 500 years was so created for raising a sum of 9000*l.* and interest, as therein mentioned, and for securing the payment out of the rents of his said estate at *Marrick*, to the testator's illegitimate son *John Morley* (since deceased), of the yearly sum of 100*l.* during his life, and the yearly sum of 300*l.* to the testator's widow, the Defendant *Jane Morley*, during her life, as her jointure, which he had already secured to her by settlement on their marriage in 1825, and in satisfaction of all her claim on his real or personal estate under the said settlement or articles, and in bar of dower. And the testator, by his said will, devised his manor of *Beamsley*, and all other his estates in the parishes of *Skipton* and *Addingham*,

in the county of York, to the Defendant *Morley*, upon trust to sell the same, or so much thereof as should be necessary for raising and paying the amount due in respect of the incumbrances upon the said estates at *Marrick*, *Skipton*, and *Addingham* (except the said sum of 9000*l.* and interest, and the said two annuities of 100*l.* and 300*l.*, secured by the said term of 500 years), and to apply the proceeds of the said sales in paying off the charges in exoneration of his personal estate; and he directed his said trustees to settle his said manor of *Beamsley*, and the unsold parts of the said estates at *Skipton* and *Addingham*, upon the same trusts as those which were, by his said will, declared of his said estate at *Marrick*, except the said term of 500 years, and the said sum of 9000*l.* and interest, and the said two annuities of 100*l.* and 300*l.* secured thereby. And the said testator directed, that the said sum of 9000*l.* and interest should be paid to his three younger children, *Thomas Morley*, *Mary Morley*, and *Dorothy Morley*, or such of them as should attain the age of twenty-one years, or, being a daughter, marry under that age; and the said testator made a specific bequest of certain effects to the said *Francis Morley*: and the said testator devised and bequeathed the residue of his real estates, and his leasehold and other personal estate, unto the Defendant *Morley*, upon trust to sell the same, except such real or personal estate as he might become entitled to under the will or wills, codicil or codicils, of *Jane Cornforth* and *Dorothy Cornforth*, or either of them, and to apply the proceeds of the sale thereof in payment, in the first place, of his debts other than the said mortgage debts on his said estates at *Marrick*, *Skipton*, and *Addingham*, and of his funeral and testamentary expenses and legacies; and, in the next place, in payment of his said mortgage-debts, in exoneration of his said estates in the parishes of *Skipton* and *Addingham*; and to stand possessed of the surplus of such proceeds, and also of such real

1856.

RODDAM

v.

MORLEY.

Statement.

1856.
 {
 RODDAM
 v.
 MORLEY.
 —
Statement.

and personal estate as he might become entitled to under any will or codicil of the said *Jane Cornforth* and *Dorothy Cornforth*, or either of them, in trust for the testator's said four children, share and share alike. And he appointed the said Defendant *Morley* his executor.

The testator died on the 7th of February, 1827, leaving his said son *Thomas* his heir-at-law.

After the testator's death the Defendant *Morley* proved the will, got in the testator's personal estate not specifically bequeathed, and sold and received the proceeds of the sale of his real estates, other than his estates in *Marrick*; and also, for many years, received the rents and profits of the said estates in *Marrick*, and such of the other estates as remained unsold; and, out of the amounts so received, paid divers of the testator's debts, but did not pay any part of the said principal sum of 300*l.* secured by the said bond, but he, or the said *Francis Morley*, as tenant for life of the said *Marrick* estates, paid all the interest which accrued due thereon up to the 29th day of May, 1847; but no interest which had accrued due since that time had been paid.

This was a suit by the obligees of the bond against the real and personal representatives of the obligor, to recover the bond debt out of the obligor's personal or real estate.

Argument.

Mr. *Bagshawe*, Q. C., and Mr. *Bagshawe*, for the Plaintiff.
 —The payment of interest on the bond by *Francis Morley* has kept the debt alive as against the obligor's real estate: *Francis v. Grover* (a) decided this in the case of an annuity, charged by will upon real estate, and paid by the devisees in trust within twenty years; and so in *Fordham v.*

(a) 5 Hare, 39.

Wallis (a), it was held that payment of interest by the executor and beneficial devisee of the maker of a promissory note kept alive the payee's remedy against the real estate. And payment of interest by a tenant for life keeps alive the debt against those entitled in remainder; for, in *Wynne v. Styan* (b) it was held, that, where a mortgagee was also tenant for life of the mortgaged estate, time did not begin to run against the mortgage-debt until his death.

1856.
RODDAM
v.
MORLEY.
—
Argument.

Mr. *James*, Q. C., and Mr. *Cairns*, for some of the parties interested in the real estate, cited *Morley v. Morley* (c).

Mr. *Willcock*, Q. C., and Mr. *Selwyn*, for the principal Defendants.—This bond debt is barred by the Statute of Limitations, as against the persons entitled to the real estate of the obligor. Devisees are not bound by the testator's bond in the same manner as the heir is, if named. The 3 & 4 W. & M. c. 14, s. 2, provides, not that the devisee shall be liable, but that the devise shall be void, and that thereupon the heir may be sued, the devisees being joined with him in the action. Therefore, whatever might be the effect of an acknowledgment or part payment by the heir, acknowledgment or part payment by a devisee cannot keep alive the debt.

Payment of principal or interest by a stranger will not keep alive a charge within sect. 40 of 3 & 4 Will 4, c. 27, as in *Homan v. Andrews* (d), where it was decided that estates subject to charges having been conveyed, part to *A.* and part to *B.*, a payment of interest by *B.* after the lapse of twenty years would not revive the right to proceed against *A.* The acknowledgment must be made by some person who had authority to bind the parties liable; and it

(a) 10 Hare, 217.

(b) 2 Ph. 303.

(c) 1 Jur. N. S. 1097.

(d) 1 Ir. Chanc. Rep. 106.

1856.

RODDAM

v.

MORLEY.

Argument.

was therefore held in *Briggs v. Wilson* (a), that an acknowledgment of a simple contract debt by the executors and devisees in trust of the debtor, did not revive it against the real estate. [VICE-CHANCELLOR.—I am quite clear that the promise of a tenant for life could not bind those entitled in remainder; the only question is, whether any new promise is necessary, whether, by the payment of interest, the bond is not taken out of the operation of the statute, and left afloat, as it would have been under the old law.] The payment of interest could have no such effect, unless made by one who had authority to bind all the parties liable: *Channell v. Ditchburn* (b), *Davies v. Edwards* (c), *Way v. Bassett* (d), *Toft v. Stephenson* (e). [The VICE-CHANCELLOR mentioned *Ault v. Goodrich* (f)]. If such a payment as was made in this case is to have that effect, it would if made at any time or by any stranger, and the consequence would be that the title to land would never be safe against such claims: *Wilkinson v. Wilkinson* (g).

Mr. J. H. Palmer, for other parties, cited *Hunting v. Sheldrake* (h).

Mr. Bagshawe, Q. C., in reply, cited *Elvy v. Norwood* (i), *Carter v. Sanders* (k), *Burrell v. Lord Egremont* (l).

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have had time, during the interval which has occurred in the argument of this case, to consider the question, and

(a) 5 De G., M'N. & G. 12.

(b) 5 M. & W. 497.

(c) 7 Exch. 22.

(d) 5 Hare, 55.

(e) 1 De G., M'N. & G. 28.

(f) 4 Russ. 430.

(g) 9 Hare, 204.

(h) 9 M. & W. 250.

(i) 5 De G. & S. 240.

(k) 2 Drew. 248.

(l) 7 Beav. 205.

I think that there is a great distinction in principle between the cases of a bond and a simple contract debt. The authorities, with reference to the latter, have proceeded on the ground that, in order to prevent an action to recover it from being barred, a new promise within six years must be established, the plea in the action being *non assumpsit infra sex annos* (a), and it follows that no one can make such new promise, except the original party or his agent. Consequently, in the case of a simple contract debt, a promise by a tenant for life would not bind those in remainder, nor would the promise of an executor bind the heir. The case of a bond is different under either statute: under the 3 & 4 Will. 4, c. 42, it is plain that it is not on the principle of a new promise, that the exception in the 5th section gives a new period of twenty years—there is no reference there to a promise, which would be barred by the lapse of six years. I must, therefore, look for a different principle as guiding the Legislature in making this provision. As to bonds, if the Plaintiff's claim be good, the law must be regulated by the 3 & 4 Will. 4, c. 27, and not c. 42; for, by the old law, there was no specific period of limitation within which an action must be brought upon a bond—the action might be brought at any time. It was subject to the plea of *solvit ad diem* by the common law, if the condition had been performed, and the bond debt had been paid at the proper time: or to a plea of *solvit post diem*, by the 4 Ann. c. 16, if paid after the proper day (b). If interest had been paid afterwards, the plea must be *solvit post diem*—if nothing had been done to recognise the bond within twenty years before the action, the law would presume satisfaction—the verdict in the action still proceeded on the plea of payment; but the Court in that case directed the jury to find that the bond was satisfied. Payment of interest within twenty years, however, would prevent such presumption, and the jury would then be

1856.
RODDAM
v.
MORLEY.
—
Judgment.

(a) See Selwyn's *Nisi Prius*, 6th edit., p. 135. (b) *Id.*, pp. 569, 570.

1856.
RODDAM
v.
MORLEY.
Judgment.

directed to find that the bond was not satisfied. It was held that such payment might be proved by an indorsement on the bond acknowledging the payment of interest, in the handwriting of the party suing on the bond, because such an acknowledgment, being adverse to his own interest, might be given in evidence to rebut the presumption of satisfaction (a). I am inclined to think, though I do not know any direct authority to that effect, that payment of interest on the bond by any person having such an interest in the matter as a devisee for life of the obligor's real estate, who might have been sued together with the heir in an action on the bond, would have been sufficient under the old law to rebut the presumption of satisfaction.

The 3 & 4 Will. 4, c. 42, s. 3, put an end to the doctrine of presumption, and imposed a peremptory bar by prohibiting an action on the bond after it had remained unrecognised for twenty years. There is an exception in section 5, that, if any acknowledgment shall have been made either by writing signed by the party liable, or his agent, or by part payment or part satisfaction, an action may be brought in respect of the money so acknowledged to be due "within twenty years after such acknowledgment by writing or part payment or part satisfaction;" and the question which arose in my mind was, whether the Legislature did not mean to preserve the principle of presumption of payment, to adopt the rule that the bond should be presumed to have been paid, and to enact that no action should be brought upon it if there had been no payment in respect of it within twenty years, but to leave open the presumption, and to allow the action, if the acknowledgment or part payment should have been made within that time. But it is plain that this right was only to be reserved against the person making the acknowledgment, because the section proceeds to enact, that

(a) See *Serle v. Lord Barrington*, *Ld. Raym.* 1370.

"in case the person or persons entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be at the time of making the same beyond the seas," the action may be brought within twenty years after the disability has ceased, plainly pointing to the person by whom the acknowledgment was made, as the party liable to be sued, and not treating the acknowledgment as being in itself an acknowledgment which should set the right free against all persons liable on the bond, but only as giving a right of action against the particular party who made the acknowledgment. There is, therefore, an absolute prohibition of any action upon the bond, and an exception only of the person by whom an acknowledgment of liability may have been made within twenty years; and, therefore, on the words of the Act, independently of any question—whether the person making such acknowledgment could, by his own act, bind those who come after him as persons entitled in remainder—the remedy is barred, except as against the party making the acknowledgment.

1856.
RODDAM
v.
MORLEY.
Judgment.

The only question then is, whether this case can be treated as within the provisions of the 3 & 4 Will. 4, c. 27, s. 40; and, if so, what is the effect of that section? There is no authority for holding the bond to be within section 40 of that Act; and, in the absence of authority, I think I am bound to decide that it is not. The terms of that section are, "no action or suit, or other proceeding, shall be brought to recover any sum of money secured by any mortgage, judgment, or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity."

Now, certainly in one sense, a bond is "payable out of" real estate, but in one sense only. It is not a charge upon real estate. It simply gives the obligee a right of action

1856,
 RODDAM
 v.
 MORLEY.
 ———
Judgment.

against the heir of the obligor, if named in the bond, which, by 3 & 4 W. & M. c. 14, was extended to the devisee of the obligor. The operation of that statute is well illustrated by the case of *Hunting v. Sheldrake* (a). The heir being bound, and the action being against him in respect of the real estate descended to him, the statute 3 & 4 W. & M. c. 14, annuls a devise of the land, and leaves the estate in the hands of the heir, so as to enable the obligee to sue him. But the Court of common law, in such a case, is bound to perform one of the functions of the Court of Chancery; the Plaintiff must make parties to the action all persons who claim under the devise, in order that they may see that the accounts are properly taken, to ascertain the amount of the debt: and where there was no heir, as no action could be brought against the Crown claiming by escheat, the estate could not be recovered from the devisees, because no action could be brought against them alone. The remedy is a personal remedy in damages against the Defendants to the action, but the amount of damages to be recovered would be measured by the quantity of land descended. The parties are liable to the amount of the bond debt, but on obtaining judgment the obligee can only proceed against the land. Then, in order to prevent circuitry of action, and to avoid a race between several bond creditors to obtain judgments to affect the land, it is the practice to file a bill in Chancery, and this Court will distribute the property among all the bond creditors as far as it will go, as personal estate is administered among simple contract creditors. These provisions do not make a bond debt a debt "charged on or payable out of land," within the 3 & 4 Will. 4, c. 27, s. 40. That is made more clear from the language of a subsequent part of that section. The Act proceeds: "Unless in the meantime some part of the principal money, or some interest thereon, shall

(a) 9 M. & W. 250.

have been paid, or some acknowledgment of the right there-
to shall have been given in writing signed by the person by
whom the same shall be payable, or his agent, to the person
entitled thereto or his agent." That must refer to some
person connected with the land. As it was said in *Elvy*
v. Norwood (a), that section of the Act is dealing only with
charges on the land, and the "party by whom the same shall
be payable" there means a party liable in respect of his in-
terest in the land. The person who paid interest in this
case being a devisee of a limited interest in the land, and
subject to be joined as party in an action on the bond, can-
not be said to be a party by whom the same is payable, nor
can the bond debt be treated as divisible between him and
those entitled in remainder, so as to make him liable to pay
interest upon it in respect of his life estate. The truth is,
the tenant for life of the obligor's real estate is liable to be
joined as a Defendant in an action for the whole debt. It
may be necessary to come into a Court of equity afterwards
to arrange the rights of the parties. He is not like a tenant
for life of an estate subject to a mortgage, which is a dis-
tinct charge upon the land, and as to which the equity of
the parties interested is, that the tenant for life is liable to
keep down the interest as between himself and the remain-
derman. That accounts for the decision in *Burrell v. Lord*
Egremont (b): as long as the interest is paid by a person
who is, by the rules of equity, liable to such payment, the
debt is kept alive. There is no analogy from any case in
equity or at law, to make the tenant for life of an obligor's
real estate liable to pay the interest on a bond debt. The
proper course for the obligee is to obtain a judgment at
law for the whole debt against all the devisees, or to have
the estate sold in this Court, and distributed among the
several claimants; which is done not because bond debts
are payable out of the land, but only because such a
course affords a more easy remedy to bond creditors. In

1856.
RODDAM
v
MORLEY.
Judgment.

(a) 5 De G. & S. 240.

(b) 7 Beav. 205.

1856.
 RODDAM
 v.
 MORLEY.
 Judgment.

Morley v. Morley (a) the Lord Chancellor said: "The Statute of *Westminster* gives the right to a judgment creditor to take, not the whole of the lands, but half of the lands in execution of the writ of *elegit* as it is called; but the right that a bond creditor has against the lands of the giver of the bond when he sues the heir, whether that be a right by statute or, as I believe it is, a right by common law, is a right to treat the heir as being a debtor, and to recover judgment against him on the debt, but limited in this way, that he is to take his execution from the lands that have descended upon the heir from the ancestor, and according to the form that is expressly stated in the judgment, and then upon that a writ of *elegit* issues to the sheriff, commanding him to inquire of what lands the ancestor died seised, and what descended to the judgment debtor, and of what lands the judgment debtor was seised at the time the writ was sued out, and those lands he was desired to extend and take in satisfaction of the debt. This being the nature of the legal rights of bond creditors, what is the course that this Court takes in respect of such debt? Why, I take it that this Court does not give, or affect to give, to such creditors, equitable rights, any more than it would to simple contract creditors, or to bond creditors in respect of the personal assets; and, although equitable rights are enforced in this Court, it is merely that this Court makes itself auxiliary to giving a more convenient redress, because it is intended to be practically the same, or that which they would all have got at law, if they had all sued concurrently."

I cannot, therefore, hold that this case comes within the 40th section of the 3 & 4 Will. 4, c. 27. If I did, I do not think that the person liable to pay under that section would be the tenant for life of the obligor's real estate, for the purpose of holding a payment by him to have the effect of keeping the debt alive as a charge against the estate.

(a) 1 Jur. N. S. 1097.

The bill must be dismissed, but, as the question is new, without costs.

Mr. Willcock, Q. C., referred the Court to another case of *Dundas v. Blake* (a).

(a) 11 Ir. Eq. 138.

1856.
RODDAM
v.
MORLEY.
—
Judgment.

GROVES v. WRIGHT.

Feb. 18th,
19th & 21st.

BENJAMIN WRIGHT, by his will and codicil, dated in 1826 and 1827 respectively, after directing that all his just debts, funeral and testamentary expenses and charges should be paid and discharged by his executrix thereafter named; and, after certain specific bequests, gave, devised, and bequeathed all the rest, residue, and remainder of his estate, both real and personal, whether in possession, reversion, remainder, or expectancy, and parts and shares of estates, and all and singular his right, title, and interest therein or thereto, and wheresoever the same might be situate, and of which he should or might die seised; and all his household goods and furniture, plate, linen, and china, and household effects whatsoever, *farmiug stock and imple-*
ments of husbandry, debts, sum and sums of money, and securities for money and other the personal estate of which he should or might die possessed, unto and to the use of his son the Defendant *John Wright*, his son in law the Defendant *George Groves*, and the testator's wife *Elizabeth*, and

Farmiug Stock
—*Legatee for*
Life—Profits
distinguishable
—*Bailiff.*

Farmiug stock and imple-
ments of hus-
bandry are not
things quæ
ipso usu con-
sumuntur,
and therefore
a gift of them
for life does
not confer on
the legatee for
life the abso-
lute interest
in them.

A farmer
bequeathed
farmiug stock
and imple-
ments of hus-
bandry and re-
siduary real
and personal
estate to trus-
tees, upon
trust to per-

mit his wife to have the full benefit and enjoyment of the same for life, and then to sell them, and divide the proceeds among his children. The widow, after the testator's death, with the assistance of her son, who was one of the trustees and a legatee in remainder, carried on the testator's farm, and took additional land to farm on lease in the name of her son. On the death of the widow:—*Held*, that the lease of the additional land, and the stock thereon, belonged to her estate, and the stock on the original farm, to the estate of her husband.

Held, that the son was bailiff of the widow, and, on his making a claim to be beneficially entitled to the additional land and the stock thereon, which was not supported by any evidence proving a gift of it to or a purchase by him, he was made to pay the costs occasioned by such claim; but an inquiry was directed whether any and what sum was proper to be allowed him as bailiff.

1856.
 GROVES
 v.
 WRIGHT.
 —
Statement.

their heirs, upon trust that his said trustees, or the survivors or survivor of them, his heirs, executors, and administrators, should permit and suffer his wife to have the full use, benefit, and enjoyment of the same during her life, if she should so long continue his widow and unmarried; and from and immediately after the decease or marriage of his said wife, upon further trust to convert into money all and singular the estate and property thereinbefore devised and bequeathed to his said trustees as aforesaid; and, for that purpose, to execute all necessary contracts, acts, deeds, and conveyances in the law whatsoever; and upon further trust, to pay and divide the same money unto, between, and amongst his son the Defendant *John Wright*, his daughter the Plaintiff *Mary*, the wife of the Defendant *George Groves*, and his daughters the Plaintiff *Elizabeth*, the wife of the Plaintiff *Jacques Husband*, and the Plaintiff *Francis*, now the wife of the Plaintiff *Thomas Orton*, and his son the Defendant *Benjamin Wright*, in equal shares and proportions, and their respective executors and administrators; and he appointed his said wife his sole executrix.

The testator died on the 13th of October, 1827, and his will and codicil were, shortly after his death, proved by the said *Elizabeth Wright*.

The only further facts which seem necessary to be stated for the purposes of this report, are the following:—

Elizabeth Wright subsequently entered into possession of all the testator's property, and paid his debts, which exceeded the value of the whole property so given to her for life, including the farming stock and effects. The widow, therefore, received no advantage from her husband's assets; all the farming stock, however, remained unsold, and the widow therewith continued to carry on the farm. Afterwards, she took additional land adjoining to farm, on a lease, in the

name of *John Wright*; and she, together with *John Wright* and two of her daughters, who were now Plaintiffs in this suit, lived together on the farms so occupied by her; and by degrees more farming stock was added to that left by the testator, to enable her to carry on the larger farm. The widow, moreover, changed the name which was on the farming stock and utensils of the testator, and put her own name upon them; and *John Wright* never, during her life, made any change in that respect, nor in any way, except that, on taking the larger farm in 1840, it was taken in his name, and he therefore became liable to the rent.

1856.
GROVES
v.
WRIGHT.
Statement.

Elizabeth Wright died on the 30th of June, 1853, intestate. The Defendant *Benjamin Wright* took out administration to her. He and *John Wright*, and the three female Plaintiffs, were the sole next of kin of the said *Elizabeth Wright*.

The bill was filed to carry into execution the trusts of the will of the said *Benjamin Wright*, and to administer his real and personal estate, and also the personal estate of the said *Elizabeth Wright* his widow.

The principal question that arose was, to whom the farms and farming stock thereon belonged on the death of *Elizabeth Wright*.

John Wright carried on the farm business after the widow's death, and now claimed to be beneficially entitled to the farm which was taken in his name, and to the stock upon it.

The arguments are sufficiently noticed in the judgment.

1856.
 GROVES
 v.
 WRIGHT.
 Argument.

Mr. *James*, Q. C., and Mr. *Chapman Barber*, for the Plaintiffs.

Mr. *Daniel*, Q. C., and Mr. *E. F. Smith*, for *John Wright*, cited *Acheson v. Fair* (a), *Giddings v. Giddings* (b), *Walker v. Woodward* (c).

Mr. *Toller* and Mr. *Torriano* for the other Defendants.

[VICE-CHANCELLOR.—I have a strong impression that this farming stock was the property of the widow. I do not think that I ought to allow the case to go to law. The stock certainly was not the property of *John Wright*, who seems to have been bailiff of the widow, if not a trustee; and a question may arise whether he cannot claim something as bailiff for managing the farm.]

Mr. *James*, Q. C., in reply, cited *England v. Downs* (d).

Judgment was reserved.

Feb. 21st.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD, after stating the facts, and commenting on the evidence, proceeded to give judgment as follows:—

The effect of the transactions seems to be, that the widow remained at the time of her death the owner of the farm; and that *John Wright* was her bailiff, giving his services for the benefit of his mother and sisters and himself, who were all living upon this property, and were, during the widow's life, supported by means of it; and I think, that, when the additional farm was taken, it was taken by the widow, and, as it was stocked by her, I must hold that the stock, as well as the farm, was hers.

(a) 3 Dru. & War. 512.
 (b) 3 Russ. 241.

(c) 1 Russ. 107.
 (d) 6 Beav. 269.

The legal points which arise upon these facts are peculiar, and present more difficulty.

1856.
 GROVES
 v.
 WRIGHT.
 Judgment.

The first question is on the effect of the bequest of farming stock to the widow for life, and a direction, that, after her death, the whole should be sold, without any direction for carrying on the business. I cannot think that the doctrine relating to things *quæ ipso usu consumuntur*, can have any application to a gift of farming stock. That doctrine applies to a personal use exhausting the subject of gift. I must regard the intention of the testator. He says nothing, it is true, about carrying on the business; but what could the widow have done with the property so given to her? Could she have sold it? It might have been sold with her consent; but, in that case, surely the income only of the proceeds must have been paid to the widow for life. That is, perhaps, begging the question of the application of the doctrine as to things *quæ ipso usu consumuntur*; but no case has been cited, in which, the whole of the testator's farming stock having been the subject of the gift, that doctrine has been held to apply. Where all the wine in a house is given to one for life, of course the legatee for life may drink it. And there was a case in which carriage horses were held to come within the same rule; but there the tenant for life had actually used them. Here, farming stock is given for the benefit of the testator's widow for life. She could not personally use it so as to consume it; the only use she could so personally make of it would be to sell it. By such a bequest, the testator must, I think, have intended that his widow should have the use of the stock, contemplating that she would carry on the business of the farm with it. She might have allowed the stock to be sold, and have taken the income of the produce for life, leaving the capital to the legatees in remainder; or if not, I must suppose that the testator contemplated that she would carry on the business; and if, in the course

1856.
 GROVES
 v.
 WRIGHT.

Judgment.

of such business, it was necessary that any part of the farming stock should be sold, then the substituted stock would follow the course of the original subject of the bequest.

Then the difficult part of the case is this: The widow, being entitled to use this farming stock during her life for her own benefit, would of course be entitled to all the profits which she made by such use. She seems to have found the farm business profitable, and she extended it; and instead of 60 acres, I find that she occupied 240 acres. Would it be just that the fruits of her personal labour should be added to the estate of the testator, when, certainly, if she had invested it in the funds, no one could say it was not her own. So, if she had bought an estate, or if she had taken another farm a few miles off, and had applied her surplus profits in stocking it, keeping sufficient stock on the farm of the testator to carry it on as usual, all that the legatees in remainder could have claimed would have been the stock on the sixty-acre farm, and not that which had been bought with the profits made by the labour of the tenant for life, any more than they could have claimed the money if she had invested her profits in the funds. Therefore, if the two farms which the widow occupied had been separate, no difficulty would have arisen on this point. The stock on the sixty-acre farm would then have belonged to the testator's estate, and the stock on the other farm would have been her own. *England v. Downs*(a) does not assist me on this point. That was a case of a different character; Lord *Langdale* there felt the difficulty of the point which I have now to consider. A lady had, settled to her separate use, property in the nature of stock in trade. Her husband appropriated it, and applied it to his own use, it being in the nature of trust property; and Lord *Langdale* seems to have considered, that, as the husband had done so, he could not as against his wife claim the accretions; but that the accretions of the trust

(a) 6 Beav. 269.

property must belong to the trust: and that was all that he decided. Lord *Langdale's* words in his judgment in that case, are: "Here the wife was entitled for her separate use; she might have received the profits of this trade, and either spend them or lay them out in increasing the capital. If she laid out those profits in increasing the capital, which would be for her separate use, could her husband at any time have the right to say that the increase of capital should be for his benefit, and not continue for the purpose for which she intended to increase the capital belonging to the trade. Mr. *Chandless* very forcibly put the case, how would it be as to the wife herself? If the wife herself had received the different sums of money which became due in the course of the business, and, instead of spending that money, had thought fit to lay it out in increasing the capital, would it not have been necessary for her to say, I intend this increase of the capital as a permanent investment for the benefit of the trust. I think that is a question of some difficulty. I do not think that is quite so clear as it has been considered to be in argument."

1856.
GROVES
v.
WRIGHT.
Judgment.

In this case, the widow rightly took possession of the property. It was her property, to use, if she thought fit, for the purpose of carrying on the business; and having properly so used it, the question is, is the property to be treated as if it were simply trust property, in which case, if a trustee mixes the trust property with his own, he is bound to distinguish such parts of it as he claims to be entitled to. It is said, the rule is the same in case of a person claiming to be the beneficial owner of property; and, no doubt, if there were a substantial difficulty in distinguishing the different parts of it, that would be the result. But I think that there is, in this case, a means of distinguishing it, though I shall have to put the parties to some expense in the mode of doing that, which must be the consequence of the course which they have taken in this matter.

1856.
GROVES
v.
WRIGHT.
—
Judgment.

If the widow had simply carried on the farm, and with the surplus profits had stocked another farm, the stock on the original farm would belong to the testator's estate, and the other stock would be the widow's own. I think the same rule may be applied, and that I may make a declaration to the effect, that the widow of the testator, having carried on the farming business of the testator after his death, and having therein employed the farming stock and effects bequeathed to her for life, and having also carried on the business on additional land which was afterwards taken in the name of *John Wright*, was entitled to all such farming stock and effects as, at her decease, were on the said additional farm, and would be properly attributable to, and would be fit and proper for the carrying on of the farming business upon such additional land; but that the testator's estate was entitled to all such farming stock as was on the original land, and was proper for carrying on the farming business of the testator at his death. Then there must be an inquiry what, according to this declaration, should be taken to be the farming stock of the testator and of the widow respectively, and the respective values thereof at the time of the decease of the widow.

I now proceed to consider what are the rights of *John Wright* in this matter. It was argued, that I ought to leave this question to be decided in an action of trover; but I think that such action, or any other proceeding at law, could not properly determine the specific rights of the parties in a case circumstanced like the present. To say nothing of the fact that the administrator has declined to proceed at law, the case seems to be necessarily one for the decision of a Court of equity, and I have no difficulty in coming to the conclusion that *John Wright* was not the owner of any part of this property. I shall, therefore, declare that the farm on which the widow resided at the time of her death, was occupied and farmed by *John Wright* as

bailiff or agent of the widow; and that the farming stock and effects thereon at the time of the decease of the widow formed part of her personal estate, and ought to have been sold at her decease. Inquire of what the stock and effects on the said farm now consist, because there may have been an alteration since her death; and then declare the same, that is, what it now consists of, including any accretions made to the said stock and effects, as the same existed at the death of the widow, by means of the employment and use thereof by the said *John Wright*, ought to be deemed to be part of the personal estates of the testator and of the widow respectively, and ought to be apportioned between the two estates according to the respective values of such stock and effects at the death of the widow as shall have been apportioned to their said estates.

1856.
GROVES
v.
WRIGHT.
Judgment.

Another question is, what is to be done as to *John Wright's* position in respect of the property. I do not think it fair to exclude him from all compensation for carrying on this business; and I am of opinion, that I should treat him as a bailiff for the widow, and not simply as her trustee, which character I think it is impossible to consider that he held. I shall therefore direct an inquiry, whether he has expended any money of his own, independently of his receipts as bailiff of the widow, in carrying on such farming business, and what is proper to be allowed him in respect of such payments. Then inquire whether he is liable for the rent or otherwise in respect of the said farm being taken in his name, and direct that he is to be indemnified against such liability out of the estate of the widow. Inquire whether any and what sum is proper to be allowed to the said *John Wright* for the management of the said business, regard being had to his having been maintained thereout, and to any excess of his receipts over his payments in respect thereof. Let all necessary accounts be taken for the purposes aforesaid. Appoint a receiver, with liberty to any of

1856.
GROVES
v.
WRIGHT.
Judgment.

the parties to propose themselves; because I do not wish to dispossess *John Wright*, if he can give proper security. Tax the costs of the Defendant *Groves* occasioned by this unfounded claim of *John Wright* to be the owner of the property, and order *John Wright* to pay those costs. Inquire whether any and what part of the testator's real estate has been sold since his decease, and by whom the produce thereof has been received, and how the same and every part thereof has been applied. Sell the rest of the testator's real estate. Take the usual account of the personal estate of the widow. Tax the costs of the Plaintiff, and of the Defendant *Groves*, of so much of the suit as was occasioned by the unfounded claim of the said *John Wright* to be the owner of the said farming stock and effects, and direct the said *John Wright* to pay such costs; and no further costs are to be allowed in respect of so much of the said suit as relates to such claim.

Reserve further consideration and the other costs of the suit. Liberty to apply.

NOTE.—There were other matters in the decree not material to this report.

1856.

TEE v. FERRIS.

Feb. 22nd.

ROBERT SUPLE, by his will, dated the 18th of August, 1846, after making several specific devises and bequests of part of his real and personal estates, devised and bequeathed all the rest, residue, and remainder of his freehold, leasehold, and copyhold lands and hereditaments, unto and to the use of the Plaintiffs *Tee*, *Chanter*, and *Wills*, the Defendant *Ferris*, and one *Dix*, their heirs, executors, administrators, and assigns, upon trust for sale. And after directing the payment of certain legacies out of the proceeds of the sale, the testator declared, that, after payment of such legacies, and of certain legacy duty, his said trustees should stand possessed of the surplus of such proceeds for such intents and purposes, and in such manner as he should by a codicil, which it was his intention forthwith to make, direct or appoint, give, or bequeath the same. He then directed his executors to stand possessed of his residuary personal estate and effects for such intents and purposes and in such manner as he should by codicil direct or appoint, give, or bequeath the same; and declared it to be his will, that, if either of his trustees and executors therein named should decline to prove his will, and act in the execution of the trusts thereby reposed in him, he should lose and forfeit all claims, benefits, and interests thereunder. And the testator there-

Charity—
Mortmain—
 9 Geo. 2, c. 36
—Secret Trust
—Wills—
 7 Will. 4 & 1
 Vict. c. 26—
Fraud.

Testator devised real and personal property to *F.* and the Plaintiffs, their heirs, executors, &c. as tenants in common; and by a memorandum of even date, addressed to them and signed by the testator, but not attested, he expressed his confidence that they would appropriate the property to charitable objects.

On the day of the testator's death the will and the memorandum, which for sixteen months

had been kept secret by the testator, were read over to him in the presence of *F.*, by a solicitor, who was in attendance at the testator's request, communicated through *F.*, to take instructions for a codicil. The Plaintiffs remained in ignorance of the existence of the memorandum, and of its contents, until after the testator's death:—*Held*, that, with respect to *F.*, the case was the same as if the testator had himself communicated to him the contents of the memorandum; and that *F.*'s silence when the memorandum was read, was equivalent to an undertaking on his part to carry the testator's intentions, as therein expressed, into effect; the Court therefore declared, that the one-fourth share given to *F.* was affected by the trusts of the memorandum, so far as they were valid; and that such trusts were invalid as to real estate, and as to personal estate affected with realty.

But *held* also, that the devise, being to *F.* and the Plaintiffs as tenants in common, the Plaintiffs were not affected by the communication of the testator's intentions to *F.*, and were entitled to the remaining three-fourths as tenants in common.

1856.
 THE
 v.
 FERRIS.
 Statement.

by appointed the Plaintiffs, the Defendant *Ferris*, and *Dix* executors in trust of his will.

By a codicil of even date with, and executed immediately after, his will, the testator, after bequeathing certain specific and pecuniary legacies, gave and bequeathed the residue of the proceeds of his real estate, and also the residue of his personal estate not disposed of by his will and codicil, to his trustees and executors, the Plaintiffs and *Ferris*, *equally between them*.

On the same day, the 18th of August, 1846, the testator, after the execution of the codicil of that date, signed a letter, directed to the Plaintiffs and the Defendant *Ferris*, which was as follows:—

Bristol, August 18th, 1846.

“ Gentlemen,—In consequence of not being able at present to decide upon disposal of the residue of the proceeds of my real and personal estates, I have, by a codicil to my will of this date, bequeathed the same to you, to prevent inconvenience which might result from claims by my relations in *Ireland*, for whom I have liberally provided by my will, to any part of my undisposed property; but I have adopted this course in the entire confidence, that if I should from any circumstances die without making a disposition of such residue, that you will appropriate it to charity objects, in your sound discretion; in doing which I beg to claim your attention to the Orphan Asylum at *Hooks Mill, Bristol*.

I am Gentlemen, yours truly,

(Signed) ROBERT SUPLE,

To *Charles Tee, James Chanter, Richard Ferris*, and
William Day Wills, Esquires, trustees and executors
 in my will.”

By a second codicil, executed by the testator on the 20th of December, 1847, (the day of his death), the testator re-

voked some pecuniary legacies, and authorised his trustees to postpone the sale of his real estate for a period not exceeding three years; and, in that case, directed interest to be paid at 4*l.* per cent. on certain of the legacies previously given.

1856.
THE
v.
FERRIS.
Statement.

The will and both codicils were proved by the Plaintiffs and the Defendant *Ferris*; *Dix*, having refused to prove, renounced probate and disclaimed by deed all the trusts of the will.

The bill was filed by *Tee*, *Chanter*, and *Wills*. *Ferris*, *Francis Hogan* (the heir-at-law of the testator), the testator's next of kin, and the Attorney-General were the Defendants.

The Plaintiffs charged by their bill, that the testator never parted with the letter of the 18th of August, 1846; that they were not aware of the existence of that letter till after the testator's death; that, during his lifetime, the contents, purport, or effect of the letter were never communicated to the Plaintiffs, or any of them; and that they had never accepted, or in any manner assented to, or carried out the trusts therein contained; that the testator never communicated to the Plaintiffs, or any of them, that he had made or intended to make such codicil, or that he intended to devise or bequeath any part of his real or personal estate to any charitable purpose, or that he wished that such real and personal estate, or the proceeds thereof, or any part thereof, should be applied for any charitable purpose.

The bill contained an admission that the letter, and the testator's will and first codicil, were read to the Defendant *Ferris* in the presence and hearing of the testator.

The bill prayed for the usual administration decree; and for a declaration that the clear residue of the testator's per-

1856.
 THE
 v
 FERRIS.
 —
Statement.

sonal estate, and of the produce of his real estate, was divisible into four equal parts; and that each of the Plaintiffs was entitled to one such equal fourth part for his own absolute use and benefit. And it further prayed, that the rights of all parties in and to the remaining one equal fourth part might be ascertained and declared.

The charges in the bill, as stated above, were supported by the evidence in the cause.

The Defendant *Ferris*, by an affidavit in the cause, deposed as follows:—

“ To the best of my belief the testator never parted with the letter referred to in the bill, but retained it in his possession up to the time of his decease. I was not aware of the existence of the letter until the 20th of December, 1847, (the day of the testator’s death). I had known the testator for thirty years and upwards previously and up to the time of his decease, and had been on terms of intimate acquaintance with him during the whole of that period, and was in the habit of almost daily communication with him. On the 20th of December, 1847, I was with the testator at his house; and some conversation having taken place between us in relation to his will, I was requested by the testator to fetch to him one *Isaac Cooke*, late of the city of *Bristol*, solicitor, but now deceased, for the purpose of carrying into effect some alterations which the testator wished to make in the disposition of his property. Upon my return to the testator in company with *Isaac Cooke*, after some conversation had passed between him and the testator relative to the alterations desired by him in his will, I was requested by the testator to fetch his will from his repository; and I accordingly brought from the repository a sealed packet, which contained the will and first codicil, and with the letter referred to in the bill, and delivered the same to *Isaac*

Cooke, who then opened the packet. *Isaac Cooke* then suggested that (for the purpose of taking instructions for the alterations required) he should read aloud to the testator the will and first codicil, and also the letter, which he accordingly did; and I then, for the first time and from the accident of my being present at the time *Isaac Cooke* was taking instructions for the preparation of the second codicil to the will of the testator, became aware of the existence and of the contents of the letter. The letter was not communicated to me at the desire of the testator; and there never existed any understanding between me and the testator that I would carry into effect any of the wishes and views expressed in the letter, or that I would hold the property devised by the testator's will and codicil, or any part thereof, upon any trust; and I never in any manner accepted, admitted, or acknowledged any such alleged trust. The testator in his lifetime gave me distinctly to understand, and on one occasion positively assured me, that I should be one of his residuary legatees, and should derive considerable personal benefit under his will."

1856.
TEN
v.
FERRIS.
Statement.

Mr. *Rolt*, Q. C., and Mr. *Piggott*, for the Plaintiffs.

Argument.

The Plaintiffs are entitled each to one-fourth part of the residue of the testator's personal estate, and of the produce of his real estate, for their own absolute use and benefit.

Upon the face of the will and codicil, the gift to the Plaintiffs is an absolute gift for their own use and benefit. The Court cannot look upon a document like the letter of the 18th of August, 1846, which is not executed and attested in conformity with the Act 7 Will. 4 & 1 Vict. c. 26; for it is the duty of the Court to support that statute as much as the statute 9 Geo. 2, c. 36: *Wallgrave v. Tebbs* (a). Nor

(a) *Supra*, p. 313.

1856.
 THE
 v.
 FERRIS.
 —
 Argument.

can that letter be relied on as being such a communication of the testator's intentions in making the gift, as to raise a secret trust. So long as the testator lived, neither the letter nor any part of its contents was ever communicated to any of the Plaintiffs; and the circumstance of the letter having been accidentally communicated to the Defendant *Ferris*, when the testator was almost in the article of death, and after it had been for sixteen months carefully kept out of sight by the testator, is one which cannot affect the Plaintiffs.

This case is not like *Russell v. Jackson* (a), which was a clear case of fraud. A positive arrangement had there been entered into between the testator and one of the devisees, that the intentions of the testator should be carried into effect; the will was made after, and in consequence of, that arrangement, and, under the will so made, the devisees were to take as joint tenants. One of the devisees having been guilty of fraud, it was impossible for the other, consistently with *Huguenin v. Baseley* (b), to derive a benefit under the fraud so committed (c). Here, there was no arrangement with any of the devisees, and the devise is made to the parties not as joint tenants, but as tenants in common.

Mr. Chandless, Q. C., and Mr. S. Thompson, for the Defendant *Ferris*.

The Defendant *Ferris* is entitled to the remaining one equal fourth part of the clear residue of the testator's personal estate, and of the produce of his real estate.

Wallgrave v. Tebbs (d) shews, that, to constitute such a trust for a charity as shall render a devise void under the stat. 9 Geo. 2, c. 36, all the elements of an ordinary trust are

(a) 10 Hare, 204.

(b) 14 Ves. 289.

(c) 10 Hare, 212.

(d) *Supra*, p. 313.

requisite. Lord *Eldon's* observations at the close of his judgment in *Muckleston v. Brown* (a), shew that there must be some "bargain," some agreement or understanding, between the testator and the devisee; that the testator's intention in making the gift must have been communicated in such a manner as to constitute "a contract with the devisee." Per Lord *Eldon* in *Stickland v. Aldridge* (b), commenting on Lord *Hardwicke* in *Addlington v. Cann* (c). And with this agree *Podmore v. Gunning* (d), and all the authorities there cited.

1856.
THE
v.
FERRIS.
Argument.

Here, there has been no such bargain, agreement, or understanding. All the elements requisite to constitute a trust are wanting. For sixteen months, from the date of the will to the death of the testator, the letter containing the testator's intentions was anxiously suppressed; nor was it until a few minutes before his death that it transpired, and then accidentally. Though read to the testator in the presence of *Ferris*, there is nothing to shew that the testator was aware that *Ferris* heard its contents. To hold that such a communication of the testator's intentions constitutes a trust, would be to introduce an entirely new head of equity.

[They cited also *Lomax v. Ripley* (e).]

VICE-CHANCELLOR SIR W. PAGE WOOD:—

As far as the case of the Defendant *Ferris* goes, I cannot allow this devise to take effect. It is well settled law, that, if the testator had read over to *Ferris* his will, and also the letter of the 18th of August, 1846, and said, 'Mr. *Ferris*, I have made that will, and written that letter expressing

Judgment.

(a) 6 Ves. 52, 69.

(d) 7 Sim. 644.

(b) 9 Ves. 519.

(e) 19 Jur. 272.

(c) 3 Atk. 141.

1856.
THE
v.
FERRIS.

Judgment.

my intentions in making it;' and *Ferris* had said nothing in reply, he would, in this Court, have been taken to have contracted to carry those intentions into effect.

It is argued, that, for sixteen months, *Ferris* knew nothing about the letter. But the facts remain, that the testator, on his death-bed, sent *Ferris* to fetch his solicitor, "for the purpose of carrying into effect some alterations which he wished to make in the disposition of his property." The solicitor accordingly attends the testator to make "some alterations" in his will. And he suggests, that, "for the purpose of taking instructions for the alterations required, he should read aloud to the testator the will and codicil, and also the letter;" and he does this accordingly, and does it in the presence of *Ferris*.

The Ecclesiastical Court, by admitting to probate the codicil executed by the testator on this occasion, has determined that the testator was then of sound and disposing mind, memory, and understanding. I must therefore hold, that, although so near death, he was perfectly conscious of all that took place, and adopted the proceedings of his solicitor as his own; and I must treat the case as if the testator had himself read over all these documents to Mr. *Ferris*.

That being so, it is impossible to contend that a beneficiary, placed in such a position, is at liberty to stand by, and say nothing; and, having so stood by and said nothing, is then to be at liberty, after the testator's death, to turn round and claim the benefit given him on the face of the will, as if it had been given to him absolutely.

Of course, in making a suggestion of fraud, I am only suggesting what might be done by a beneficiary if I were to accede to what was urged on behalf of Mr. *Ferris*. Mr. *Ferris*, on the contrary, has behaved very honorably in the

matter. But for what he has stated, the Court would have known nothing of the existence, in his case, of any secret trust whatever.

1856.
 THE
 V.
 FERRIS.

As regards the Plaintiffs, I think they have distinguished their case from that of *Russell v. Jackson*, and on that I must hear a defence.

Judgment.

Mr. Selwyn and Mr. Cairns, for *Francis Hogan* the heir-at-law of the testator, and for the testator's next of kin.—*Russell v. Jackson* is a clear authority, that communication with one devisee is communication with all.

Argument.

[The VICE-CHANCELLOR.—In *Russell v. Jackson*, one of two devisees had procured a devise to be made to himself and the other devisee.]

And here *Ferris* has procured the devise to himself and his co-devisees to be left unrevoked, which amounts to the same thing. The will being ambulatory till the death, it is immaterial whether the communication was made before or after the devise, provided it preceded the testator's death. *Ferris*, by his conduct, procured the devise to be left unrevoked, and that is equivalent to procuring the devise to be made in the first instance.

[The VICE-CHANCELLOR.—Suppose a testator says to A., 'I have given *Whiteacre* to you for *St. Bartholomew's*, *Blackacre* to B., for *St. Thomas'*, and *Greenacre* to C. for *St. George's*; would that avoid the devises to B. and C. ?]

If there were assent, or an absence of dissent, on the part of A., the whole gift would be bad. Here *Ferris's* having assented, or not having dissented,—which amounts to the same thing—has prevented the testator from altering his

1856.
 TEE
 v.
 FERRIS.
 —
Argument.

will, as he would otherwise have done, in respect of all the devisees.

Then, as to the tenancy in common. The Court looks, in all cases, to the last declaration of trust. The last declaration of trust is, in this case, contained in the letter of the 18th of August, 1846,—a document which the Court has already admitted in evidence by reading it against *Ferris*. And, according to that letter, which is addressed to the four devisees as “trustees and executors of the testator’s will,” the devisees are joint tenants. The tenancy in common, therefore, disappears; the four devisees take in joint tenancy; the principle of *Russell v. Jackson*, derived from *Huguenin v. Baseley*, applies; and the devise is void as to all.

Mr. *Wickens*, for the Attorney-General, took no part in the argument.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If my decision was right in *Wallgrave v. Tebbs*(a), that case, and not *Russell v. Jackson* (b), is the authority which governs the present. The principle of the decision in *Wallgrave v. Tebbs* was, that the Statute of Frauds,—or rather I should say the Statute of Wills (c), by which the Statute of Frauds is now in this respect superseded,—is to be upheld equally with the Statute of Mortmain (d). And, according to the Statute of Wills, the Plaintiffs have a right to say that the Court cannot look at the letter of the 18th of August, 1846, in which, as it is alleged, the testator’s intentions are expressed.

(a) *Supra*, p. 313.

(b) 10 *Hare*, 204.

(c) 7 Will. 4 & 1 Vict. c. 26.

(d) 9 Geo. 2, c. 36.

On the Defendant *Ferris* the Court can fix a trust; not, however, by means of the letter, but because, by the reading of that letter in his presence, the testator was in effect communicating with *Ferris*, and telling him all its contents. In thus fixing a trust on *Ferris*, I am not reading the letter, as the argument for the heir represented me as doing, as part of the testator's will. On the contrary, I treat the case as if no such letter had ever existed, but as if a communication to the effect contained in that letter had been made *vivâ voce* in the testator's presence, and under circumstances similar in all other respects to those under which the reading of the letter took place. Had such a communication been so made, it is clear that, so far as *Ferris* is concerned, it would have been impossible for him to take anything under this will.

1856.
 TEE
 v.
 FERRIS.
 —
Judgment.

Then, how far does the principle of *Huguenin v. Baseley*, as followed in the case of *Russell v. Jackson (a)*, apply to the case of the Plaintiffs?

The way in which Lord Justice *Turner* in *Russell v. Jackson (b)* applied the principle of *Huguenin v. Baseley (c)* was this:—He said in effect, ‘ You, *William Jackson*, by your conduct procured a gift to be made to the other devisee, *Thomas Jackson*, which would not otherwise have been made to him; and, inasmuch as your conduct was what this Court considers fraudulent, it is impossible, according to *Huguenin v. Baseley* and that class of authorities, to hold that *Thomas Jackson* takes anything under that gift.’

It was argued for the heir and next of kin, that, there being a gift to four persons, if one of them had said he declined to take the property on this secret trust, the testator would have revoked the gifts to all the four. But here the

(a) 10 Hare, 204.

(b) *Id.* 212.

(c) 14 Ves. 289.

856.
 THE
 v.
 FERRIS.
 Judgment.

testator has trusted all four of these persons upon their honor; and all I can presume that he would have said, in case *Ferris* had declined to take the property upon that trust, is 'Very well, Mr. *Ferris*, as you decline to have your name so inserted, I will put in some one else.'

I cannot distinguish the present case from that which I put in the course of the argument, of separate devises of distinct estates to separate individuals, with a secret intention to benefit so many charitable institutions;—in which it would be impossible to hold, that the circumstance of the testator having communicated his intentions to one of the individuals, would render void the devises to the rest, to whom no such communication had been made. To hold this, would be to put it into the power of any one among several beneficiaries under a will, to come forward from bad motives,—as Mr. *Ferris* has here come forward from motives of an opposite character,—and to deprive all the rest of the benefits to which they are entitled under the will, by falsely suggesting, that, in his case, there was a secret trust for an unlawful purpose.

I consider that I am logically bound by my former decision in *Wallgrave v. Tebbs*, to which I adhere.

Minute of
 Decree.

DECLARE, that the one-fourth share given to the Defendant *Ferris* is affected by the trusts declared thereof by the letter of the 18th of August, 1846, so far as such trusts are valid. But declare also, that such trusts are invalid as regards the real estate of the testator, and such part of his personal estate as is affected with realty. And it appearing by the evidence in the cause, that the whole of the testator's personal estate is so affected, and her Majesty's Attorney-General not opposing, let the one-fourth part of such personal estate be applied as follows:— * * * * * And let one-fourth of the produce of the real estate be paid to *Francis Hogan* the heir-at-law of the testator.

Declare, that the Plaintiffs are entitled to the remaining three-fourths as tenants in common.

1856.

IN RE THE TRUSTS OF ANTHONY BIRCH'S LE-
GACY UNDER SARAH BISSELL'S WILL;

March 12th
& 15th.

AND

IN RE THE ACT 10 & 11 VICT. c. 96 (a).

UPON this matter, which has been already reported in this volume (b), being now spoken to upon the form of the order, Mr. *Speed*, for *Anthony Birch* the insolvent, contended, that the insolvent ought not to have been served with the petition; and that, therefore, according to the practice, the Petitioner must pay his costs.

Trustee Relief Act—10 & 11 Vict. c. 96—Costs of Petitioner whose Claim fails—of Respondent unnecessarily served.

Mr. *De Gex* for the Petitioner, submitted that, as the affidavit of the trustees on paying the money into Court mentioned the name of the insolvent as one of the persons who were or claimed to be entitled to the fund, the service on him was proper.—He also referred to *Day v. Croft*(c) and *Re Hertford Charity* there cited, to shew that, according to the present practice, a respondent was not entitled to appear, for the mere purpose of asking for his costs.

A petitioner, claiming a fund under the Trustee Relief Act, allowed his costs although his claim failed.

According to the present practice, a respondent, unnecessarily served, is not, as a matter of course, entitled to his costs of appearing.

Judgment.

The VICE-CHANCELLOR SIR W. PAGE WOOD said, that the affidavit of the trustees was, that the insolvent "was or claimed to be entitled by virtue of his certificate," which, having regard to his insolvency, was clearly a groundless claim. His Honor, however, said, that he should follow the authorities referred to, although with some reluctance, as he had thought that the reason assigned for the former practice was a good one, viz. that a respondent ought to be repaid the expense to which he had been put by being unnecessarily served.

(a) Ex relatione Mr. *De Gex*. (b) *Supra*, p. 328. (c) 19 Beav. 518.

1856.

In re
BIRCH'S LE-
GACY UNDER
BISSELL'S
WILL.

The costs of the Petitioner, of the assignees under the second bankruptcy, and of the trustees, were ordered to be paid out of the fund in Court; but no order was made as to the costs of the insolvent.

Feb. 13th.

LEDWARD v. HASSELLS.

*Will—Condi-
tion precedent
—Infancy—
Discharge to
Executors—
Suit.*

THOMAS LEDWARD, by his will, dated the 31st of May, 1845, after directing his debts and funeral expenses to be paid, and giving a legacy of 50*l.*, continued as follows:—

A bequest to *A.* for life, and after *A.*'s death to *B.*, "if he be then living and able to give my executors a good and valid discharge for the same," otherwise, gift over to *C.*; and then another bequest of residue to *C.*, "if he shall be living and able duly to discharge my executors at the time such residue is payable, but if otherwise," gift over to *B.*

B. and *C.* were infants at the date of the will, and *C.* was an infant at the death of the testator:—

Held, that *C.*'s infancy did not prevent his performing the condition, as he could duly discharge the executors by a suit in Chancery.

Seemle, the question would have been more difficult if the terms of the condition had been the same as those of the condition annexed to the bequest to *B.*

"I give and bequeath the interest of 900*l.* as now secured to me by two several bonds of 400*l.* and 500*l.*, (both by the same person), unto *Elizabeth Bourne*, my hired servant and housekeeper, to take the whole thereof after defraying all expenses incurred by my executors relative to the same, for and during the term of her natural life; and the principal of the said 900*l.*, after the death of the said *Elizabeth Bourne*, and subject to expenses which may be incurred by my executors relative to the same, I give and bequeath unto *James Pitts*, son of my late sister *Ann Pitts*, if he be then living and able to give my executors a good and valid discharge for the same; otherwise, I give and bequeath the said principal sum of 900*l.* then subject to expenses as aforesaid, unto my nephew *William Ledward*, son of my brother *William Ledward*, his heirs and assigns, for ever, but not otherwise. The whole residue of my estate and effects I give and bequeath unto my said nephew *William Ledward*, if he shall be living and able duly to discharge my executors at the time such residue is payable; but if other-

wise, I give the whole of such residue unto *James Pitts*, son of my late sister *Ann Pitts*; but, in either of the last-mentioned cases, subject to expenses sustained by my executors in respect of the same."

1856.
LEDWARD
v.
HASSELLS.
Statement.

And the testator appointed the Defendants *Hassells* and *Barlow*, and the survivor of them, and the heirs, executors, or administrators of such survivor, the executors of his said will.

At the date of the will *James Pitts* and *William Ledward* were both infants. At the death of the testator *James Pitts* had attained twenty-one, but not *William Ledward*.

William Ledward now filed the bill in this suit to recover the 900*l*.

Mr. *Daniel*, Q. C., and Mr. *Southgate*, for the Plaintiff.

Argument.

The Plaintiff is absolutely entitled to his legacy. The executor by this suit will obtain an effectual discharge notwithstanding the Plaintiff's infancy. In *Tanner v. Tebutt* (a), a condition annexed to a devise, that the devisees should, within seven years after the death of the testatrix, personally appear before the executors, and deliver to them a testimonial of their identity, and in default thereof gift over, was considered satisfied by one of the executors and the agent of the other going to a devisee who was very aged and infirm, and unable to go to them.

Mr. *Haddan* for *James Pitts*.

The condition cannot be performed by the Plaintiff by

(a) 2 Y. & C. C. C. 225.

1856.
 {
 LEDWARD
 v.
 HASSELLS.
 — —
Argument.

reason of his infancy, and therefore the gift over must take effect.—He cited *Hollinrake v. Lister* (a), *Burgess v. Robinson* (b), *Simpson v. Vickers* (c), *Tulk v. Houlditch* (d), *Hawkes v. Baldwin* (e).

Mr. *Beaumont* for the executors.

The reply was not called for.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

This will is no doubt obscure, and it is not easy to collect from it the precise intention of the testator. Adopting the view that the condition is precedent, I must look at the terms of the condition, and not make them more adverse to the main object of the testator than the words themselves warrant. It is plain that the testator did not contemplate the disability of infancy alone. If he had he could easily have so expressed himself. He imposed a similar condition in the case of another legatee; and if it had been on the ground of infancy only this absurdity would arise. Both were infants at the making of the will, one being older than the other. There is a gift to *A.* the elder, if able to give the executors a good discharge, and if not, to *B.*; and then another gift to *B.* the younger, if he should be able duly to discharge the executors, and if not, then to *A.* That the testator should give a legacy to a person, but if he should be under disability as an infant, then to one younger still, could never be the intention. The gift over cannot be intended to take effect on the ground of infancy alone, though that may be included in the condition.

(a) 1 Russ. 500.

(b) 3 Mer. 7.

(c) 14 Ves. 341.

(d) 1 V. & B. 248.

(e) 9 Sim. 355.

If the question had arisen upon the terms of the legacy to *Pitts*, there would have been more difficulty, because I must follow the words of the condition closely, and the words in that case are—"if he be then living and able to give my executors a good and valid discharge." But assuming those words to mean, that *Pitts* was to do some personal act, as by giving a receipt, or otherwise to discharge the executors, I do not think that the same difficulty arises on the words of the condition attached to the gift which is in question. The terms there used are—"unto my nephew *William Ledward*, if he shall be living and able duly to discharge my executors at the time such residue is payable, but if otherwise," over. Conceding that it may have been the desire of the testator that his property should not be tied up during the minorities of the legatees, and that he was anxious that the property should be taken at once by the objects of his bounty, and that his executors should be discharged, am I to say that an infant legatee is not able to discharge the executors, when he can do so by filing a bill in this Court. By that means the executors would get a full and complete discharge, and the only effectual discharge which they could have. Filing such a bill, though by a next friend, is the infant's own act, and that would discharge the executors. It is argued, that the same reasoning would apply if the legatee had aliened his interest; but that is not so: because it may well be, that the testator's intention was, that the legacy should not go to the legatee's assigns, but should be a personal benefit to himself. It is suggested, that the assign might require the legatee to file a bill against the executors, or might himself file a bill in the legatee's name; but that would not be a discharge by the legatee; besides, the legatee might not be satisfied with the accounts, and might object, and then the gift over would take effect.

Without straining the words of the condition, I think it

1856.
LEDWARD
v.
HASSELLS.
Judgment.

1856.
 LEDWARD
 v.
 HASSELLS.
 Judgment.

is clear that infancy was not the one only thing pointed at. But, though it might possibly be one point which was present to the testator's mind, I do not find anything in the words to prevent my holding that the Plaintiff is able by his own act, by means of filing a bill, duly to discharge the executors according to the condition.

Feb. 25th &
 26th.

JOB v. BANISTER.

Lease—Covenant for perpetual Renewal—Breach of Lessee's Covenants—Ejectment—Costs.

A lease was granted of copyhold houses and lands in London, for twenty-one years, subject to a small rent, and to the usual cove-

nants to repair, insure, &c., with the usual proviso for re-entry on breach of any of the covenants; and also a covenant by the lessor, *provided the rent should have been paid and the covenants kept*, at the request in writing of the lessee, to procure from the lord of the manor a license to demise the premises for the further term of twenty-one years, and so from time to time, *provided such request should be given as aforesaid*: and, on obtaining such license, to grant a new lease with the same covenants, including the covenant for renewal. Subsequently, the lease was renewed on the expiration of the term, by a new lease for twenty-one years containing similar covenants. The lessee expended money on the premises, and the value of the property was much increased. The covenants in the renewed lease, to repair and to insure, were broken, and, at the end of the renewed term, the landlord, on account of the breach of the covenants, refused again to renew, and brought an action of ejectment:—*Held*, that a Court of equity would not compel the landlord to renew, nor restrain him from ejecting the lessee.

Held, that the construction of the covenant for renewal in the first lease was not, that in future leases the renewal was to be on request only, whether the lessee's covenants had been performed or not, because it provided that the renewed lease should contain a like covenant for renewal.

As the case was one of great hardship on the lessee, and the question had not before arisen in the case of a lease with a covenant for perpetual renewal, the Court dismissed the bill without costs.

35*l.*, payable quarterly, and subject to the covenants therein contained, on the part of the lessee, his executors, administrators, and assigns to be observed and performed. And the said *Stephen Day* thereby covenanted with the said *William Cain*, his executors, administrators, and assigns, that he the said *Stephen Day*, his heirs or assigns, would, at the expiration of the said term of twenty-one years thereby granted, (provided all arrears of rent should then have been paid, and all the covenants thereinbefore contained should then have been well and truly performed and kept), at the request, costs, and charges of the said *William Cain*, his executors, administrators, or assigns, (provided such request should be signified to the said *Stephen Day*, his heirs or assigns, in writing, at least three calendar months before the expiration of the said term thereby granted), apply for and procure, or endeavour to procure, from the lord of the said manor of *Cantlowes*, otherwise *Cantlers*, a license for demising and letting the same premises for the further term of twenty-one years, to commence from the expiration of the term thereby granted, and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given as aforesaid, and, when such license or licenses should have been obtained, would, at the request, costs, and charges of the said *William Cain*, his executors, administrators, and assigns, from time to time grant and execute to him or them a new lease of the said premises, and all other erections and buildings which should have been built, for such further term of twenty-one years accordingly, at the same yearly rent, and subject to the same provisoes and agreements as were in the now stating indenture contained (*including the covenant for renewal*), he the said *William Cain*, his executors, administrators, and assigns, at the same time executing and delivering, at his and their like charges, a counterpart of every such new lease.

1856.

JOB

v.

BANISTER.

Statement.

1856.
JOB
v
BANISTER.
Statement.

Cain erected thirteen houses on part of the land comprised in the said lease, leaving room for the subsequent erection of several other houses on the remainder of the said premises.

By an indenture of lease, dated the 10th of February, 1834, a new lease of the said premises was granted, pursuant to the covenant for renewal so contained in the said original lease, for the term of twenty-one years from the 25th day of December then last, at the like yearly rent of 35*l.*, and under and subject to the like covenants and agreements on the tenants' and lessees' part to be performed or observed. And such renewed lease contained a covenant that the lessor would, at the expiration of the said term of twenty-one years thereby granted, (provided all arrears of rent should have been then paid, and all the covenants thereinbefore contained should then have been well and truly performed and kept), at the request, costs, and charges of the lessees, their executors, administrators, or assigns, (provided such request should be signified to the lessor or her assigns, in writing, at least three calendar months before the expiration of the said term thereby granted, apply for and procure, or endeavour to procure, from the lord of the said manor of *Cantlowes*, otherwise *Cantlers*, a license for demising and letting the same premises for the term of twenty-one years, provided such request in writing should be given as afore-said; and, when such license or licenses should have been obtained, should and would, at the request, costs, and charges of the said lessees, their executors, administrators, and assigns, from time to time grant and execute to them a new lease of the said demised premises, and of all other erections and buildings which should then have been built, with their appurtenances, for such further term of twenty-one years accordingly, at the same yearly rent, and under and subject to the same covenants, provisoes, and

agreements as were contained in the now-stating indenture, including the covenant for renewal thereof; the said lessees, their executors, administrators, or assigns, at the same time executing and delivering at her, his, and their like costs and charges, a counterpart of every such new lease.

1856.
—
JOB
v.
BANISTER.
—
Statement.

Both the original and renewed leases contained the usual covenants on the part of the lessee to keep in repair, and to insure the premises, and a proviso for re-entry by the landlord on breach of any of the covenants.

The Plaintiff subsequently purchased the lease, and erected upon part of the land comprised in the said leases, ten new houses, and converted another house into two, and expended upon the said premises several thousand pounds.

The term of twenty-one years granted by the said last-mentioned lease expiring on the 25th day of December, 1854, the Plaintiff, on the 6th day of March, 1854, duly applied in writing to the landlord for a renewal of the lease of the said premises, pursuant to the terms of the said covenant for renewal.

The Defendants, however, objected, that the covenant to keep the premises insured had been broken, by allowing the premises to be uninsured for a short period of time.

One of the houses was also very much out of repair, and the Plaintiff, when he found that the landlord objected to renew the lease, delayed to repair it.

The Defendants brought actions of ejectment in May, 1855, to recover the premises; and thereupon the Plaintiff filed his bill in this suit to restrain such actions, and for specific performance of the covenant to renew.

1856.
 }
 JOB
 v.
 BANISTER.
 —
Argument.

Mr. Rolt, Q. C., and Mr. Boyle, for the Plaintiff.

This is not like an ordinary lease of houses and land, but is in effect a grant of the property, subject to a perpetual rent-charge, which, as the property is copyhold, could only be done in this way, by granting a lease for twenty-one years, renewable for ever. In such a lease the principal object is to secure the rent; and the power of re-entry, and the power of the lessor to refuse to renew the lease if the covenants are not performed, are in the nature of penalties, against the excessive enforcement of which equity will relieve: *Peachy v. The Duke of Somerset* (a), *Hill v. Barclay* (b), *Reynolds v. Pitt* (c), *Eaton v. Lyon* (d), *Hannam v. South London Waterworks Company* (e), *Fitzgerald v. O'Connell* (f).

In ordinary cases of a covenant for perpetual renewal, this Court will relieve a lessee from a forfeiture for not literally complying with the terms of the covenant: *The Earl of Ross v. Worsop* (g).

Then the form of this covenant for renewal in the original lease is, that there should be a renewal of that lease provided the covenants should be performed, and from time to time, upon request in writing of the lessee; therefore, the covenant in the renewed lease should have been to renew upon request only, and a proper request was made.

Other points were taken upon the construction of the particular leases, which it is not necessary to report.

Mr. Willcock, Q. C., and Mr. Bagshawe, jun., for the Defendants.

(a) Pre. Ch. 568; 1 Stra. 447.

(b) 18 Ves. 56.

(c) 19 Ves. 134.

(d) 3 Ves. 690.

(e) 2 Mer. 65, n.

(f) 1 J. & L. 134.

(g) 1 Bro. P. C. 281.

VICE-CHANCELLOR SIR W. PAGE WOOD, (without calling upon the Defendants' counsel)—

This is a case of considerable hardship.

As to the principal points raised in the argument, the first was, that this lease ought to be regarded as simply a security for money. The fallacy of that argument is, that it assumes that the lessor only desired to have a rent of 35*l.* a year, but in truth he also contracted to have other rights. It is not a mortgage, or a grant of a rentcharge, but what it purports to be—whatever may be the peculiar consequences of the land being of copyhold tenure—and what upon the face of the transaction it is, namely, a lease. The lessor stipulates not only for a certain yearly rent, but for other benefits; there are buildings erected on the land, and if they should become out of repair, he stipulates that he is to have a right of re-entry. What right have I to interfere between the parties to this legal contract? One has agreed to insure, to keep the premises in repair, &c., and the other that, if the covenants are observed, he will renew the lease continually on the same terms, but if not, it is agreed that he shall re-enter and occupy. That being the contract, though the rent was probably the thing chiefly in mind, can I reject the other parts of the contract. It is as much a part of it that the lessor should have the right to re-enter on breach of the covenants to insure or to repair, as that he should have the rent. I cannot think that this is like the case of a mortgage, or that I can deal with it in any other way, except as this Court always deals with breaches of covenant, that is, by leaving the parties to their rights as determined at law.

The next point is this: The form of the covenant for renewal is, that *Day*, his heirs or assigns, at the end of the term of twenty-one years thereby granted, (provided all arrears of rent should then have been paid, and all the cove-

1856.
} JOB
v.
BANISTER.
—
Judgment.

1856.
 }
 JOB
 v.
 BANISTER.
 —
Judgment.

nants thereinbefore contained should then have been well and truly performed and kept), should, at the request, costs, and charges of the said *William Cain*, his executors, administrators, or assigns, (provided such request should be signified to the said *Stephen Day*, his heirs or assigns, in writing, at least three calendar months before the expiration of the said term thereby granted), apply for and procure, or endeavour to procure, from the lord of the manor, a license for demising the premises for the further term of twenty-one years, to commence from the expiration of the term thereby granted, and so from time to time upon the expiration of every subsequent term of twenty-one years, provided such request in writing should be given as aforesaid. It was argued, that there are two stipulations on which the renewal was to be made in the first instance, namely, first, that the rent should be paid and the covenants performed; and secondly, that a request in writing should be made, and so from time to time, provided only the request should be made; and thus that the first stipulation was to be dropped in future leases, and the request in writing was all that was to be required in future renewals. That was a fair point to argue, because it might be said that the lessor might be content to rely on his power of re-entry for breach of covenant, and that if he did not exercise that right, and the term was allowed to expire by effluxion of time, all that would be requisite to obtain a renewal would be a request in writing. But the covenant does not stop there, the lessor goes on to covenant, that, in such case, he will grant a new lease "including the covenant for renewal." I must take that covenant to be a precisely similar covenant to that contained in the original lease; and accordingly I find, in the lease which was granted in 1834, a covenant for renewal in the same words as the covenant in the original lease; and I must consider that it was meant that such a covenant was to be entered into toties quoties whenever a new lease was granted. Then I must hold, as to the covenant in the new

lease, that it cannot be divided into two parts; and therefore, under the lease of 1834, there must have been a due payment of the rent and performance of the covenants in that lease before the lessor could be called upon to renew.

1856.
 JOB
 v.
 BANISTER.
 Judgment.

There was a case something like this before the late Vice-Chancellor of *England*, *Thompson v. Guyon* (a), in which there was a lease for twenty-one years granted by *A.* to *B.*, with a proviso for re-entry on nonperformance of the covenants; and *A.* covenanted, that, at the end of the term, if it should not be sooner determined by *B.*'s acts or defaults, he would grant to *B.* a lease for a further term of fourteen years. It was not expressly upon the covenants being fulfilled that the new lease was to be granted; but, if the lease were not determined by the lessee's acts or defaults. There had been some breaches of covenant during the lease, which the lessor averred he had not discovered till afterwards; and the Vice-Chancellor therefore refused to prevent the lessor from exercising his right of re-entry. Further facts being stated by amendment, to shew that the lessor knew of and had waived the breaches of covenant, the Lord Chancellor, on appeal, directed issues to be tried whether the lessee had broken the covenants so as to entitle the lessor to re-enter; and if that should be found in the affirmative, then, whether the lessor had done any act on his part to disentitle himself to take advantage of that right. The issues were found for the lessor, and thereupon the bill, which was for an injunction to restrain an action of ejectment by him, and for specific performance of the covenant for renewal, was dismissed. That case therefore decided that the covenant must be construed so as to give to each party the benefit of his contract throughout the lease, and that the lessor could not be called on to fulfil his covenant to renew, unless the lessee had properly performed the covenants on his part.

(a) 5 Sim. 65.

1856.
 }
 JOB
 v.
 BANISTER.
 —
Judgment.

[His Honor then stated the facts of this case, which, he observed, shewed so plainly that there had been breaches of the covenants to insure and to repair, that it would not be proper to send the case to law, to try whether or not the covenants had been broken. And he continued:]—

If the remedy upon the covenant to renew be gone at law, it is impossible for me to interfere with this contract by deed between the parties. I believe the only case in which this Court will now interfere is, where the omission is to perform a covenant to make a simple money payment. The expenditure upon the property which the Plaintiff has made, affords no ground for relief. He was then the owner of it, and was at liberty to build on it as he pleased. The landlord was not bound to interfere and prevent his doing so, because his interest might be determined. It is suggested, that the landlord might have known the ruinous state of some of the houses. There is no distinct evidence that he did; but, even if he had that knowledge, and did not exercise his right to re-enter, there is nothing in that circumstance to make him liable to renew the lease, unless the lessee can shew that he has fulfilled the condition on which alone that covenant to renew arises. I must dismiss the bill; but I think it is hardly a case for costs.

Mr. *Bagshawe*, jun., Mr. *Willcock*, Q. C., with him, for the Defendants, urged, that there was nothing to prevent the operation of the ordinary rule, by which a party who instituted a suit which failed, must pay the costs of it.

The VICE-CHANCELLOR.—I feel considerable difficulty in dismissing the bill without costs; and the only ground which justifies my doing so is, that the case, being upon a covenant for perpetual renewal, is in that respect a novel one. In *Ireland*, where these covenants are more common, the Courts have acted on a more liberal principle. This case, too, is a

very hard one, for the lessee will lose 5000*l.* or 6000*l.* for a breach of covenant, which might be amply remedied by 500*l.* Upon these considerations, I dismiss the bill without costs.

1858.
 }
 JOB
 v.
 BANISTER.
 —
Judgment.

HEARN *v.* BAKER.

March 11th
 & 14th.

RICHARD DEAVIN made his will, dated in 1836, as follows:—"I give and bequeath all my estate and effects, of whatsoever kind or wheresoever situated, all moneys in the public funds or securities, my freehold house in *New Brentford, Middlesex*, now in the occupation of *Mr. Stevenson*, my leasehold house, being No. 3, *St. Thomas' Place* aforesaid, together with all my household furniture, plate, linen, china, money, and everything that I may be possessed of at the time of my decease, or that I may become entitled to in any way or kind, unto my dear wife *Mrs. Elizabeth Deavin*, for her sole use and benefit during her natural life, subject only to such legacies and bequests as shall be hereafter named, to be paid to the several parties after the decease of my said wife *Mrs. Elizabeth Deavin*, by my executors hereinafter named. First, I desire, as soon as possible after the decease of my wife, that my executors dispose of my freehold house in *New Brentford* in the best possible manner, and the proceeds arising therefrom (after payment of all and every expense attending such disposal) to pay in equal proportions between *Mrs. Sarah Findlay* (daughter in law of *Mrs. Ann Findlay*), *Mary Athearn*, and *Richard Athearn*, my second cousins, and *William Athearn* my third cousin, son of my deceased second cousin *William Athearn*, share and share alike. I also give to my five first cousins, *Mrs.*

*Will—Construction—
 "Survivors."*

A testator gave all his real and personal property to his wife for life, and he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, and to be paid as soon as possible after the death of his wife:—*Held*, that, following the rule in *Cripps v. Wolcott* (4 *Mad.* 11), the survivorship must be referred to the death of the testator's wife, so that one of the cousins who survived the testator, and died in the lifetime of his widow, took nothing.

Held, also, that "survivors" must be construed to include a sole survivor, so that where only one of the legatees survived the widow, such survivor took all the stock.

1856.
 HEARN
 v.
 BAKER.
 —
Statement.

Mary Athearn widow of *Mr. George Athearn*, *Mrs. Ann Findlay*, *Mrs. Jane Dalton*, *Mrs. Sarah Folow*, and *Mrs. Elizabeth Jenkins*, or the survivors of them, the sum of £1050 3*l.* 10*s.* per cent. Stock, late Navy Fives, to be equally divided between them, share and share alike. I also give to my niece *Rachael Jesse*, daughter of my late sister *Susanna Jesse*, £200 stock 3*l.* 10*s.* per cent. Consols; the whole of which legacies are to be paid as soon as possible after the decease of my wife, it being my particular desire that she enjoy the whole of my property as long as she may live; and any other money or moneys, estate or effects, not herein disposed of, to be at the entire control and free disposal of my dear wife *Mrs. Elizabeth Deavin*, in any manner she may think proper. I also hereby appoint *Mr. Edward West*, of No. 3, *Upper Dorset Place, Clapham-road*, in the county of *Surrey*, brush manufacturer, and *Mr. William Baker*, of the Excise Office, *Broad Street*, and of *Finsbury Place*, gentleman, executors of this my last will and testament, contained in two sheets of paper; and it is my particular request that my executors, *Mr. Edward West* and *Mr. William Baker*, do deduct for their own use and benefit 20*l.* each out of the legacies left by me for their trouble."

The testator died in 1847.

His wife survived him.

The said *Mary Athearn*, *Sarah Folow*, and *Elizabeth Jenkins*, respectively, died in the lifetime of the testator, and the said *Ann Findlay* survived the said testator, and died in the lifetime of his widow.

The Plaintiff was the representative of *Ann Findlay*, and now claimed to be entitled to the legacy to her.

Mr. Rolt, Q. C., and Mr. Dickinson, for the Plaintiff.

The word "survivors" in this will refers to survivorship at the death of the testator, and not of the tenant for life. In *Cripps v. Wolcott* (a), the decision was the other way; but that is explained by the Lord Justice *Knight Bruce* in *Taylor v. Beverley* (b) to be, because in *Cripps v. Wolcott* (a) there was no gift to the parties, except by a direction to pay, which made their interests contingent: *Ive v. King* (c), *Gibbs v. Tait* (d), *Macdonald v. Brice* (e).

If this be not the construction, then, if all the legatees died in the lifetime of the tenant for life, there would be an intestacy.

Mr. Willcock, Q. C., and Mr. Selwyn, for the Defendants.

Mr. Rasch for other parties.

Mr. Rolt, Q. C., in reply.

Judgment was reserved.

1856.
HEARN
v.
BAKER.
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case the question is, whether the gift by the testator's will to his cousins, or the survivors of them, must be construed according to the rule laid down by Sir *John Leach* in *Cripps v. Wolcott* (a). In that case, as was observed by the Lord Justice *Knight Bruce*, there could be no reason to doubt about the decision; because, in the will then under consideration, there was no gift except in the direction for payment, and therefore the parties who were to take were only those named in that direction for payment. If that can

Judgment.

(a) 4 Madd. 11.

(b) 1 Coll. 111.

(c) 16 Beav. 46.

(d) 8 Sim. 132.

(e) 16 Beav. 581.

1856.

HEARN

v.

BAKER.

—
Judgment.

be maintained as a distinction, there is certainly some ground for contending, on the face of this will, that there was an absolute gift to the parties; and the word "survivors" would make it a bequest to these persons and the survivors at the testator's death, and the payment only would be postponed until the death of his widow, the interests being vested at the death of the testator. But, I confess it seems to me, that the rule in *Cripps v. Wolcott* (a) has been more strictly observed than that; because, according to this argument, if by striking out the word "survivors" it appears that the interests would be vested, the rule in *Cripps v. Wolcott* (a) is not to be applied. That, however, was not the doctrine laid down in *Neathway v. Read* (b). In that case, the word "surviving" had to be construed in two senses, there being an immediate gift to the surviving children of *Catherine Neathway* without any previous life interest, so that it was only possible to construe it to mean surviving the testator; and there being also a gift to *Catherine Neathway* for life, and, after her death, to her surviving children, which latter gift was held to fall within the rule in *Cripps v. Wolcott* (a); although no one could doubt, that, but for the word surviving, the interests of the children would have vested on the death of the testator.

In the will in this case, I find nothing which can make any substantial difference in the construction. There is, first, a gift of all the testator's property to his wife for life, and then the will contains a gift, after her death, to the testator's five cousins by name, "or the survivors of them." I think that the word "survivors" must be taken to include the case of one of the legatees only surviving; and I cannot distinguish this case, in substance, from those concerning which the rule was laid down in *Cripps v. Wolcott* (a), which refers the words of survivorship to the period of the division of the fund.

(a) 3 Mad. 11.

(b) 3 De G., M'N. & G. 18.

1855.

IN THE MATTER OF THE TRUSTS OF THE WILL OF *Nov. 17th.*
MR. GEORGE BANKS, DECEASED;

AND

OF THE TRUSTEE RELIEF ACT, 10 & 11 VICT.
C. 96.

EX PARTE HOVILL.

THIS was a petition for payment out of Court of a sum paid in under the Trustee Relief Act, by the trustees of the will of *George Banks*, dated the 19th of July, 1832, which was as follows:—

“ I will and direct that all my funeral charges and other expenses attending the same shall be fully paid and satisfied, with all convenient speed after my decease, by *Sarah Banks* my daughter; and I give unto the said *Sarah Banks* all my funded property in the Bank of *England*, and I also give to my said daughter seven pieces of land, freehold, late *Manship*, in the parish of *Mitcham*, in the county of *Surrey*, called *Blacklands* and *Hoult's Corner*. And I also give to my said daughter my freehold tenement and land adjoining in *East Fields*, *Bird's Eye Corner*, and also one piece in *Short Bolsted*, as by map, in the parish of *Mitcham*, in the county of *Surrey*. And I also give to my said daughter all my household goods, and money and effects that may be found, she paying and receiving all my debts; and the said *Sarah Banks* shall in no way dispose of any of the aforesaid funded property, but to hold the same for her natural life; and if the said *Sarah Banks* should die without issue, then the said landed property shall go to *Jasper Burchett*, of the parish of *Tooting* in the county of *Surrey*, for his natural life. I will and direct that all the funded

Will—Construction—Life Estate—Personality.

Gift by will of all the testator's funded property and other personal and real estate to his daughter *S.*, she paying all his debts, “ and the said *S.* shall in no way dispose of any of the said funded property, but to hold the same for her natural life; and if she should die without issue, the said landed property shall go to *J.* for life. I will and direct that all the funded property shall go to *W.* and her heirs, forever.”—*Held*, that *S.* took the funded property for life only, and that on her death it belonged to *W.*

1855.
 In re
 BANKS' TRUST;
 Ex parte
 HOVILL.
 Statement.

property shall go to my granddaughter Mrs. *Walker* and her heirs, for ever. And I also will and direct, that, after the death of the said *Jasper Burchett*, all the said landed property shall go to Mrs. *Walker* and her heirs, for ever. And I appoint *John Philips Wasley*, artist, and *Henry Hale*, calico printer, both of the parish of *Mitcham* in the county of *Surrey*, to be executors and trustees of this my last will and testament; and that the said *Jasper Burchett* shall not sell or mortgage any of the aforesaid freehold land."

The testator died in 1833, his daughter *Sarah Banks* died on the 31st of August, 1854, and without having married.

Jasper Burchett survived the testator, and was still living.

The funded property of the testator was transferred into Court under the Trustee Relief Act.

Hovill, an assign of Mrs. *Walker*, now presented this petition to have the fund transferred to him.

Argument.

Mr. *W. M. James*, Q. C., and Mr. *De Gex*, for the petition.

Although the testator, in the commencement of the will, gives all his funded property to Mrs. *Banks*, yet he afterwards expressly directs that she shall hold it for life only; and then there is an independent sentence by which he gives the funded property to Mrs. *Walker*, through whom the petitioner claims.

But even if this sentence be considered not as an independent one, but as qualified by the expression—"if the

said *Sarah Banks* die without issue," still this will not make the limitation over too remote, for the contingency with regard to personal estate will be held to be restricted to a dying without issue living at her death. In *Ex parte Wynch* (a), the Lord Chancellor said, with reference to decisions on questions relating to real estate, "I see nothing in these decisions compelling me to hold, that, where technical words are not used, and where the interest of the first taker is expressly confined to an estate for life, I am bound to act, in the construction of the bequest of personalty, on principles derived from laws of tenure, and not writing or intention;" and Lord Justice *Turner* (b) expresses a similar opinion. But *Procter v. Upton* (c), cited in *Ex parte Wynch* (d), is so like the present as to afford a direct authority. There the gift was of personal estate, in trust for the Plaintiff, to be laid out in lands or stock, and if he died without issue, over; and Lord *Hardwicke* held that this conferred on the Plaintiff only a life interest.

Mr. *Bates* for the legal personal representatives of Mrs. *Banks*.

The bequest to Mrs. *Walker* cannot be construed independently, even in point of grammar. The sentence is this: If the said *Sarah Banks* should die without issue, then the said landed property shall go to *Jasper Burchett*, for his life, and also all the funded property shall go to Mrs. *Walker*; and I also will &c. There being these directions, the insertion of the conjunction is properly deferred till the last. But the intention is also clear not to give the funded property to Mrs. *Walker* if Mrs. *Banks* had issue. There is therefore a blended gift of realty and personalty, in terms which, as to the realty, give an estate tail, and which

1855.

In re
BANKS' TRUST;
Ex parte
HOVILL.
Argument.

(a) 5 De G., M'N. & G. 209.

(b) Id. 225, 226.

(c) Cox's MS. Op. 70.

(d) Id., p. 199, n.

1855.

In re
BANKS' TRUST;
Ex parte
HOVILL.

Argument.

according to all the authorities, must give as to the person-
alty an absolute interest.

Mr. Fooks for the trustees.

Mr. W. M. James, Q. C., in reply.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In this case there is the difficulty which always occurs where nothing but an estate for life is given to the party, and no estate is given to the issue. I doubt whether the issue take any interest by implication from the terms of the gift over.

The case cited from Cox's Manuscripts seems to apply; and, according to that case, by the words of this will, *Mrs. Banks* took only a life interest in the funded property. The funded and real and personal property are given to her, with a direction that she shall in no way dispose of any of the funded property, "but to hold the same for her natural life; and if the said *Sarah Banks* should die without issue, then the said landed property shall go to *Jasper Burchett* for his natural life." There is a complete stop here, and then the will continues: "I will and direct that all the funded property shall go to my granddaughter *Mrs. Walker* and her heirs, for ever." There is a gift of the funded property to *Sarah* for life, and then a gift over of the real estate, which might well be construed to imply an estate tail in her as to that; and then there is a break, and then a gift of the funded property to *Mrs. Walker* absolutely, which I must hold to be a gift in remainder, for I am not necessarily driven back to the words 'if *Sarah Banks* should die without issue;' but the will is perfectly consistent if it is construed to give *Sarah Banks* a life interest in the funded property, and

after her death to give the same property to Mrs. *Walker* absolutely. I think that, after the case of *Ex parte Wynch* (a) and the authorities there referred to, I cannot hold otherwise than that *Sarah Banks* takes only a life estate.

(a) 5 De G., M'N. & G. 188.

1855.
In re
BANKS' TRUST;
Ex parte
HOVILL.
Judgment.

DAVIS v. KIRK.

1856.
March 12th.

WILLIAM HARDING, by his will, dated in 1845, gave and devised all his freehold and copyhold estates to *Anthony Davis*, his heirs and assigns, to hold the same unto and to the use of the said *Anthony Davis*, his heirs and assigns, upon trust to sell all those three closes therein specifically described, and to stand possessed of the moneys to arise from such sale, upon trust to pay all the said testator's debts, funeral and testamentary expenses; and in the next place to pay the residue thereof to the said testator's wife *Ann Harding*; and as to all the rest, residue, and remainder of the said testator's real estate thereinbefore given and devised to his said trustee, upon trust to pay the rents and profits thereof unto the said *Ann Harding* for her life; and, after her decease, upon trust to convey the said residue of his the said testator's real estate unto such person as should answer the description of his heir-at-law; and the said testator appointed the said *Anthony Davis* executor of his said will.

Will—Devise
in Trust—
Heir-at-law—
Descent broken.

—
A devise of all the testator's residuary real estate to trustees in fee, upon trust to pay the rents to A. for life, and, after his death, upon trust to convey the same residuary real estate to such person as should answer the description of the testator's heir-at-law—breaks the descent of real estate which had descended to the testator ex parte materna, and vests it in his heir-at-law as equitable devisee.

The testator died shortly after the date of his will, and the said *Ann Harding*, his widow, died in 1853.

At the time of his death, the testator *William Harding* was seised in fee of copyhold lands besides those mentioned in the will, which had descended to him ex parte materna,

1856.

DAVIS

v.

KIRK.

and these were now claimed by his heir-at-law, and also adversely by his heir ex parte maternâ.

Argument.

Mr. *W. M. James*, Q. C., and Mr. *Jessel*, for the Plaintiffs.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the heir ex parte maternâ, relied on *Godbold v. Freestone* (a).

In *Danvers v. Lord Clarendon* (b) it was decided, that a bequest of personal property to A. for life, and after the death of A. to the heir of B., vested in the person who was the heir of B. at his death in A.'s lifetime, and not in the person who was such heir at A.'s death. Where the gift was of personalty to A., "and failing him by decease before me, to his heirs," and A. died in the lifetime of the testator, A.'s next of kin at the testator's death were held to be entitled: *Vaux v. Henderson* (c), *Shepp. Touchstone*, 446, *Holloway v. Holloway* (d), *Evans v. Salt* (e), *Gittings v. M'Dermott* (f), *Harris v. The Bishop of Lincoln* (g).

Where real and personal property are blended and given to the heir, it has been held that the heir-at-law takes both: *Gwynne v. Muddock* (h), *Swaine v. Burton* (i), *De Beauvoir v. De Beauvoir* (k), *Boydell v. Golightly* (l), *Tetlow v. Ash-ton* (m), *Mounsey v. Blamire* (n).

Mr. *Giffard* for other parties.

Mr. *Willcock*, Q. C., and Mr. *Karslake*, for the heir-at-law, who was also the customary heir of the testator.

(a) 3 Lev. 406.

(b) 1 Vern. 35.

(c) 1 J. & W. 388, n.

(d) 5 Ves. 399.

(e) 6 Beav. 266.

(f) 2 M. & K. 69.

(g) 2 P. Wms. 135.

(h) 14 Ves. 488.

(i) 15 Ves. 365.

(k) 3 H. L. Cas. 524.

(l) 14 Sim. 327.

(m) 20 L. J., N. S., *Chanc.*, 53;
15 Jur. 213.

(n) 4 Russ. 384.

VICE-CHANCELLOR SIR W. PAGE WOOD, without hearing the counsel for the Defendants, gave judgment as follows:—

1856.
DAVIS
v.
KIRK.
—
Judgment.

I do not think that there is any doubt about this case. I have been looking at the case of *Harris v. The Bishop of Lincoln* (a). The report of it is in the shape of an argument between the bar and the Court, counsel making an observation and the Court answering it. I find there “it was objected, that, if the will should be construed in such manner as to entitle the heir of the mother’s mother to the estate, such will would be void and nugatory, and the testator all this while would be doing of nothing, because, without any will, the premises would go to the heir of the mother’s mother, who was the heir-at-law to this estate, the heir of the mother’s father having none of the blood of the first purchaser. To which the Court said, that the testator giving by his will several annuities and charities, and then saying that the residue of the profits should go to the right heirs of the mother’s side, it was the same thing as if he had said, ‘so far I dispose of my estate, and let so much of it go from my heir who otherwise would have had it, but I will not dispose of it any further from the heirs-at-law of the mother’s side, whence it came, and where it would go in case I should not give it away.’” In other words, the Court treated it as not being a devise at all, but considered that the heir took by his better title; and that was the principle of the decision.

I think that the answer to the case of *Godbold v. Free-stone* (b), which is the only case that touches this, is, that the use is the old use. Here the devise is an express devise, which vested the whole fee simple in the trustees, and gave it away from the heir. The whole estate is devised away from the heir, and the trustees are left to deal with the legal fee simple, and to convey it to such person as should answer the description of

(a) 2 P. Wms. 135.

(b) 3 Lev. 406.

1856.
 {
 DAVIS
 v.
 KIRK.
 —
Judgment.

the testator's heir-at-law. The expression "heir-at-law" is somewhat strong; but, independently of that, the fact of the testator having divested the inheritable quality of the estate by breaking the descent entirely, and giving the estate to the trustees, and leaving them to find out the heir, has put them under an obligation to look upon the heir as a *persona designata*, and they cannot regard the inheritable quality of the estate, but they must find out the person who answers the description of heir-at-law of the testator. I think that there is not any authority precisely in point; but the principle must be, that, when once the descent is broken by a devise of the whole fee simple to trustees, upon trust to convey it to the testator's heir, they are bound to convey it to the person who is heir of the testator according to the common law.

SIR EDWARD BULWER LYTTON *v.* THE GREAT
 NORTHERN RAILWAY COMPANY.

*Railway Com-
 pany—Agree-
 ment—Specific
 Performance
 —Siding—
 "Necessary"
 and "proper."*

A railway
 company
 agreed with a
 landowner,
 through whose
 estate the rail-
 way would

pass, to con-
 struct and maintain a siding connected with their railway at *B.*, together with all necessary
 approaches thereto for public use, for the reception and delivery of goods:—*Held*, that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made.

Held, also, that the agreement did not bind the company to erect sheds, or to keep one of their servants in attendance at the siding; but that it obliged them to construct a proper siding, with approaches and a wharf or raised platform for the loading and unloading of goods.

Held further, that "necessary approaches" meant also "proper approaches."

THE Plaintiff Sir *Edward Bulwer Lytton*, being entitled to an estate for life in possession, called the *Knebworth* estate, in the county of *Hertford*, through which the Defendants, the *Great Northern Railway Company*, were making a railway, on the 5th of June, 1848, entered into an agreement with the said company as follows:—

"Whereas the *Great Northern Railway* is intended to pass through the estate called the *Knebworth* estate, in the

possession of the said Sir *Edward George Earle Lytton Bulwer Lytton* as tenant for life thereof, without impeachment of waste, under the will of *Elizabeth Barbara Bulwer Lytton*, dated the 21st of July, 1840, with remainder to his son *Edward Bulwer Lytton* for life, with remainder to the first and other sons of the said *Edward Bulwer Lytton*, with divers remainders over. And whereas the said company have given notice, in due form of law, to the said Sir *Edward George Earle Lytton Bulwer Lytton*, for the purchase of such parts of his said estates as will be required by the said company for the construction of the said railway; but the said parties not being able to agree upon the price and compensation to be paid in respect thereof, notice of ascertaining the same by jury has been given, and such price and compensation will be ascertained by the verdict of such jury: and whereas it has been agreed between the said *Great Northern Railway Company* and the said Sir *Edward George Earle Lytton Bulwer Lytton*, that the said *Great Northern Railway Company* shall make a siding from their said railway at a place called *Broadwater*, for the purposes hereinafter mentioned, and also to find and provide such communication, or, in lieu of communication, to purchase the several parcels of land hereinafter referred to: Now, therefore, it is hereby agreed by and between the said parties hereto, that the said *Great Northern Railway Company* shall make, form, and construct, and hereafter maintain, so long as the same shall be of convenience, a siding connected with their railway at *Broadwater*, together with all necessary approaches thereto for public use, for the reception and delivery of goods, wares, merchandise, and other matters and things to and from the surrounding neighbourhood, including the tenants and other persons on the estate of the said Sir *Edward George Earle Lytton Bulwer Lytton*."

1856.
 SIR E. B.
 LYTTON
 v.
 THE GREAT
 NORTHERN
 RAILWAY CO.
 Statement.

The Plaintiff called upon the Defendants to perform their said agreement, and received in reply a letter from Mr. *Sey-*

1856.
 SIR E. B.
 LYTTON
 v
 THE GREAT
 NORTHERN
 RAILWAY CO.
 —
Statement.

mour Clark, the engineer of the company, dated the 12th day of December, 1853, containing the following passage:—
 “ I propose therefore, if such will be satisfactory to you, to move this siding from the ‘ up ’ to the ‘ down ’ line, and make a spur (to use a railway technicality) so as to enable full and empty waggons to be separated. To put up signals for day use, to which period of the twenty-four hours the access from the line to the siding would be limited, and to work the traffic from *Welwyn* in this way, namely, that all trucks for the siding at *Broadwater* being left at the *Welwyn* station, would be forwarded thence, and all waggons to be sent from the siding being moved by an order from *Welwyn*, no train would be allowed to follow that that was doing the work at *Broadwater*. The approach road made by the company will thus be available to yourself and tenants, and the question of wharves, cattle landing places, roofs, &c. must be left to you, or such parties as may desire to use the siding. The company cannot build them, nor can I, under any reading of the agreement, find that they are so bound.”

The bill prayed specific performance of the said agreement, and that it might be declared, that, according to the true construction thereof, the Defendants ought not only to carry out and execute what was proposed in and by the said letter of the 12th day of December, 1853, but also to erect a wharf or platform and shed, in connection with the line of side rails, and to cause some servant of the said company to attend for the purpose of receiving goods intended to be forwarded by the said railway.

Argument.
 —

Mr. *Willcock*, Q. C., and Mr. *Hetherington*, for the Plaintiff.

Mr. *Rolt*, Q. C., and Mr. *T. Stevens*, for the company.

The VICE-CHANCELLOR reserved judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD, after shortly stating the agreement, continued as follows:—

The first question is, whether this is an agreement of which this Court has jurisdiction to direct specific performance. The Plaintiff would have thrown some difficulty in his own way on this point, if I had adopted the construction of the agreement suggested by him. I cannot however do so. He suggests that he is entitled not only to have the material things mentioned in the agreement provided, but also to have all accessory conveniences, as sheds, and a man to wait at the siding, and a crane to load and unload goods, which, however, is not asked for by the bill. But the bill asks, that the company may be decreed to place there a servant of their own to attend and receive the goods; and I should have had great difficulty in enforcing such an obligation as that for all time against the company, supposing it to be contemplated by the agreement. But the words refer to a material thing only. Nothing is said about the company carrying goods. If they do not, those who desire to use the railway may do so under the powers given them by the Acts of Parliament; and what the Plaintiff is entitled to is to have this siding formed, whatever it may be, and the necessary approaches made thereto for public use, for the reception and delivery of goods, wares, and merchandise, and other matters and things.

The Plaintiff not only takes an extreme view of his rights in requiring the company to keep a man at the siding, but also in requiring them to build sheds. If he had wished to have a station made, it would have been easy to have said so; the meaning of that word is familiar to every one. It is also equally well known that there are things called sidings, on which waggons are put aside from the main track, that people may come and remove their goods from them; and I can-

1856.

SIR E. B.
LYTTONv.
THE GREAT
NORTHERN
RAILWAY Co.

April 8th.

Judgment.

1856.
 SIR E. B.
 LYTTON
 v.
 THE GREAT
 NORTHERN
 RAILWAY CO.
 Judgment.

not give much credit to the witnesses who say that a siding, according to their interpretation of the word, means numerous other things, which may no doubt be very convenient, but which are not covered by the true signification of the word. According to that construction, the words should be equivalent to "a siding, with all proper conveniences connected therewith;" but nothing of that kind is specified in this agreement. The Defendants' witnesses on the other hand say, that the agreement contemplates a siding and nothing else; but there is also the stipulation for approaches, to which I have referred; and I cannot give a construction to the agreement which would omit any of the words.

What was proposed to be done by the Defendants included something partly for their own convenience. It is for the company's advantage to carry goods, and it is their duty to put up signals, and to take all means necessary to prevent accidents by collisions.

The secretary of the company wrote a letter to the Plaintiff, in which he says, amongst other things, "the approach road made by the company will thus be available to yourself and tenants, and the question of wharves, cattle landing places, roofs, &c., must be left to you, or such parties as may desire to use the siding."

There, it seems to me, though the point of difference is so small that I do not intend to give costs on either side, the company do set up a claim to be exempted from performing part of their obligation under the agreement. The Plaintiff is entitled to a wharf or raised platform. He claims also to have sheds, and one of the company's porters constantly in attendance; as to these I see nothing in the agreement, and if there were any such stipulation as the last, it would be difficult to decree specific performance of it.

Then the next question is, what is to be done with that

clause which says that the company are to maintain the siding. I think, as to this, that it is no objection to a bill for specific performance of an agreement to construct a work of this kind, that there is a clause in the agreement, that the party making it shall keep it in repair when made.

1856.
SIR E. B.
LYTTON
v.
THE GREAT
NORTHERN
RAILWAY Co.
Judgment.

I may order that the work shall be done; and the question of repairs will be a matter of inquiry when a breach of that part of the agreement occurs. There is no question of specific performance as to that part of the agreement at present.

The order must be as in *Sanderson v. The Cockermouth and Workington Railway Company (a)*. A reference must be made to Chambers to see that the work is duly performed. And I must adopt the decision, that the word "necessary" in this agreement means also "proper."

DECLARE, that, according to the true construction of this agreement, the company ought to make, form, and construct, in a convenient place at or near *Broadwater*, a siding, with such approaches thereto as may be necessary and proper for the convenient use of the siding, and for the reception and delivery of goods, wares, merchandise, and other matters and things.

*Minute of
Decree.*

But that the company are not bound to provide sheds or other conveniences, except as aforesaid.

Refer it to Chambers, if the parties differ, to inquire where or by what means the same is to be done.

No costs on either side.

(a) 11 Beav. 497; 2 H. & T. 327.



1856.

March 11th
& 14th.

BLINSTON v. WARBURTON.

*Will—Con-
struction—Ex-
ecutory Devise
—Dying with-
out Issue—
Special Case—
Costs.*

A devise in 1822 of real estate to *S.*, upon condition that she pay 50*l.* to *B.* by instalments of 10*l.* a year; but in case *S.* dies without issue, the land to go to *T.* or his heirs, "in consideration that he pays to *J.* or his heirs the sum of 250*l.*, twelve months after the death of *S.*:"—*Held*, that the gift conferred upon *S.* a fee simple by reason of the charge of 50*l.*; and that the gift over was to take effect upon her death without issue then living, from the direction that the executory devisee was to pay the 250*l.* twelve months after the death of *S.*

Wyld v. Lewis
(1 Atk. 432)
distinguished.

THE will of *Joseph Blinston*, dated in 1822, contained a devise as follows:—"I give to my daughter *Sarah* a dwelling-house and cottages adjoining, known by the name of *Nag's Head*, situated in *Lymm Booth* land, in consideration that she pay to *Ann Chorley*, or her heirs, 50*l.* by instalments of 10*l.* per annum for five years, to commence payable twelve months after my decease; but in case my daughter *Sarah* dies without lawful issue, the before said dwelling-house and cottages shall go to my son *Thomas*, or his heirs, in consideration that he pays to my son *Joseph*, or his heirs, the sum of 250*l.* twelve months after my daughter *Sarah's* decease."

The testator died, and *Sarah* afterwards married the Defendant *Bennett*, and died without having had any issue, but having previously executed a disentailing deed, by which she affected to convey the property to trustees, upon trust for the survivor of herself and her husband. Her husband survived her, and had possession of the title deeds.

These facts were stated in a special case, in which *Joseph Blinston* and the assign of *Thomas Blinston's* interest were Plaintiffs, and the husband of *Sarah Bennett* and the trustees of the disentailing deed were Defendants; and the questions were, whether the Defendants or the Plaintiff, the assign of *Thomas*, were entitled to possession of the title deeds, and whether the 250*l.* was a valid charge upon the property.

The Court has no jurisdiction to order the costs of all parties to a special case to be paid, unless there is a fund in Court. The proper course is to insert in the special case a question out of what estate or fund the costs should be paid.

Mr. *Rolt*, Q. C., and Mr. *C. Hall*, for the Plaintiffs, relied on *Nicholls v. Hooper* (a), in which the devise was to the testator's wife for life, and after her decease to his son *Thomas*, his heirs and assigns, for ever: Provided, if *Thomas* died without issue of his body, then the testator bequeathed to his daughters *M.* and *E.* 200*l.*, to be paid out of his estate within six months after the decease of the survivor of the wife and son; and the dying without issue was construed to mean dying without issue living at the death of *Thomas*.—They cited also *Pells v. Brown* (b), *Doe d. King v. Frost* (c), and *Kavanagh v. Morland* (d). [The VICE-CHANCELLOR referred to *Doe v. Webber* (e), and *Ex parte Davies* (f).]

1856.
BLINSTON
v.
WARBURTON.
—
Argument.

Mr. *Willcock*, Q. C., and Mr. *G. L. Russell*, for some of the Defendants.—The gift conferred an estate tail: *Doe d. Cannon v. Rucastle* (g), *Doe d. Jones v. Davies* (h), *Greenwood v. Verdon* (i).

Mr. *Horsey*, for the trustees, cited *Wyld v. Lewis* (k).

Mr. *Rolt*, Q. C., in reply.

Judgment was reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question in this case is, whether the gift by the will of *Joseph Blinston* to his daughter *Sarah* conferred on her

Judgment.
—

(a) 2 Vern. 685; 1 P. Wms. 198.

(b) Cro. Jac. 591.

(c) 3 B. & Ald. 546.

(d) Kay, 16.

(e) 1 B. & Ald. 713.

(f) 2 Sim. N. S. 114.

(g) 8 C. B. 876.

(h) 4 B. & Ad. 43.

(i) 1 Kay & J. 74.

(k) 1 Atk. 432.

1856.
 BLINSTON
 v.
 WARBURTON.
 Judgment.

an estate in tail, or an estate in fee simple, with an executory devise over in the event of her dying without leaving issue living at her death. The will is very inartificially drawn, it contains a gift in the following terms:—

“ I give to my daughter *Sarah* a dwelling-house and cottages adjoining, in consideration that she pay to *Ann Chorley*, or her heirs, 50*l.* by instalments of 10*l.* per annum for five years, to commence payable twelve months after my decease.” By this gift *Sarah* would take the fee simple, on account of the condition attached to it. The will continues: “ But in case my daughter *Sarah* dies without lawful issue, the before said dwelling-house and cottages shall go to my son *Thomas*, or his heirs, in consideration that he pays to my son *Joseph*, or his heirs, the sum of 250*l.* twelve months after my daughter *Sarah*’s decease.”

It is clear, upon the authorities, that if apt words of limitation had been used, and an estate in fee so given to *Sarah*, the case would have been within the rule laid down in *Doe v. Frost* (a) and *Doe v. Webber* (b); and the fee simple would have passed, subject to a valid gift over, because the payment was directed to be made within twelve months after the decease of *Sarah*, which points to a limited period within which the dying without issue contemplated by the testator was to take place, and therefore it resembles the words used in those cases. In the late Mr. *Prior*’s valuable book the cases are collected. In *Wyld v. Lewis* (c), Lord *Hardwicke* held, that a similar gift conferred an estate tail, and he gives as the reason, his desire to secure the estate to the testator’s grandchildren, in a note in his own manuscript, which is given in West’s Reports, 311. The devise in that case was to the testator’s wife of all his lands not settled in jointure generally, words which were not sufficient

(a) 3 B. & Ald. 546. (b) 1 B. & Ald. 713. (c) 1 Atk. 432.

to pass the fee simple; and "if it shall happen that my said wife *Elizabeth* shall have no son nor daughter by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, if he shall be then living, and his heirs, for ever, only paying to his two brothers (*A.* and *B.*) the sum of 150*l.* within one year after the decease of the said *Elizabeth*."

The words there were remarkably similar to the language used in this case; and Lord *Hardwicke* held that an estate tail was created, and he said that "the direction for the payment of 150*l.* within a year are very proper circumstances in general to be made use of, to induce the construction contended for by the Plaintiffs, and what may seem to imply an intent in the testator, that the interest of *John Wyld* under the will should, if at all, commence on the death of *Elizabeth*; but if the preceding words are proper to create an estate tail, the legal operation of them cannot be controlled by those subsequent provisions."

1856.
BLINSTON
v.
WARBURTON.
Judgment.

I notice this case because it meets one part of the argument, that the payment was to be made within a year, and therefore there was to be that interval after the death of the first devisee. Lord *Hardwicke* says, the gift over was to take effect upon a failure of issue at the death of the first taker, and a period was given afterwards in which to make the payment. Part of the report in *Atkyns* is exactly to the same effect as that in *West*, but in the latter it is stated as noticed by *Prior*, par. 118, that, from the Lord Chancellor's memorandum added to his own note of the case (*West*, 311), it appears that the prevailing idea in his mind was, to put such a construction on the will as would secure the estate to the testator's grandchildren. He evidently relied on that considerably in the first part of his judgment.

Here I find a gift for the benefit of *Sarah*, and then a

1856.
 BLINSTON
 v.
 WARBURTON.
 Judgment.

gift over in words which, referring to a payment to be made by the executory devisee within a year after the death of the first taker, would, unless *Sarah* took an estate tail, tend to shew that the limitation over was intended to take effect on her death without issue at a particular period; and the result would be, that there would be a gift for life to *Sarah*, no gift to her issue, and yet the estate was not to go over except on failure of the issue of *Sarah*. And I have first to consider whether it was the testator's intention to give any interest to such issue; and, secondly, whether, if the issue failed within a limited period, it was his intention to give the estate over to the executory devisee. It would seem an absurd intention to impute to the testator, and Lord *Hardwicke* refers to that absurdity, that *Sarah* should take merely a life interest, that her issue should take nothing, and yet, if *Sarah* died without issue, and only in that case, there should be a devise over.

In *Doe v. Webber* (a) the Court distinguishes the case in that respect, saying, that when you find a gift in fee in the first instance, the issue then take by representation, and the gift over is simply a qualification of the larger estate previously given; and that is consistent, because the issue, if any, would take by virtue of the first gift, and if there be no issue, it is reasonable that there should be an executory devise.

In *Wyld v. Lewis* (b) Lord *Hardwicke* says, "It seems clear from the words of the will, (as to all my wordly estate), which introduce the disposing part of the will, that the testator intended to make an absolute disposition of his whole estate by his will, and not suffer any part to descend as undisposed of in case of any contingency; and as he intended

(a) 1 B. & Ald. 713.

(b) 1 Atk. 432.

a disposition of the whole by his will, the objection that the grandchildren, by this construction, are liable to be excluded, is a very strong argument for construing this an estate tail; and the inclination to avoid this absurdity has been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including all the descendants of the first taker:" that is referring to the words "son" or "daughter." The real rule is admirably extracted from the cases by *Prior*, par. 104:—"A comparison of the cases of *Wyld v. Lewis* (a) and *Simmons v. Simmons* (b), with the other cases under the respective subdivisions in which they will be found, will perhaps warrant the following general conclusion: 'That when there is nothing in the will to give an estate to the issue, or to give the ancestor more than a life interest, words in the limitation over not directly expressing, but which in the generality of cases would be considered as intimating an intention on the part of the testator, that the failure of issue should be confined to a limited period, shall not have this effect; but that, on the contrary, the gift over shall, if possible, be construed as taking effect on an indefinite failure of issue, for the purpose of creating according to the rule stated (c) an estate tail in the ancestor, and thereby securing a devolution of the property to his issue.'"

I think that it is impossible to put it better than in those words; and applying that doctrine which seems to be Lord *Hardwicke's* own view in *Wyld v. Lewis* (a), though I find no case where the fee simple in the first taker was merely a constructive fee simple, but only cases where there was an absolute limitation to the party and his heirs; yet where I can give to the words "failure of issue," restricted as in this case, a meaning which implies failure within the limit-

1856.
BLINSTON
v.
WARBURTON.
Judgment.

(a) *Prior*, s. 118.

(b) *Id.*, s. 135.

(c) *Prior*, s. 179.

(d) 1 *Atk.* 432.

1856.
 BLINSTON
 v.
 WARBURTON.
 —
Judgment.

ed period after the death of the first taker, and I am not driven to a contrary conclusion by the absurdity of giving only a life estate to the parent and no interest to the issue, I am obliged to construe the limitation over to refer to the death of the first taker. I think that there is no such absurdity in this case, and I may hold that the whole fee simple passed by the first gift, and then the gift over would be good, being confined to the proper limited period. Therefore the Plaintiff *Thomas Blinston* is entitled to the deeds, and the 250*l.* is a valid charge on the property.

With respect to costs, upon a special case there should either be some arrangement between the parties, or there should be a question in the case out of what fund they ought to come. I do not think I have jurisdiction to order the payment of the costs, there being no fund in Court.



April 8th.

MATTHEWS v. WINDROSS.

*Will—Construction—
 Indefinite De-
 vise—Charge
 —Fee Simple
 —Life Estate.*

Devise in 1820 of estates *A.* and *B.* to the testator's wife for life, and after her death, estates *A.*, *B.*, and *C.* to the testator's son *J.*,

without words of limitation. Subsequently a devise of an annuity of 10*l.* to *D.* for life, to be paid out of estate *A.* by *J.*:—*Held*, that *J.* took an estate in fee simple in *A.*, but a life estate only in *B.* and *C.*

THE will of *William Windross*, dated in 1820, was as follows:—"I give, devise, and bequeath unto my dear wife *Eleanor* all the lands called *Dove Acre* and *Blake Steell* closes, with a bed and furniture for one room, such as she may fix on after my decease, for and during the term of her natural life; and from and after her decease, then *I give, devise, and bequeath unto my son Joseph Windross the Dove Acre close, also the first low Blake Steell close, with the cow-house, also the dwelling-house he now lives in,* with

all the appurtenances belonging thereto. I also give, devise, and bequeath unto my son *James Windross* the sum of 80*l.* given to me by his uncle *William Knowles*; I therefore appoint the said sum to be paid out of the following land hereafter mentioned; that is to say, the second *Blake Steell* close, called *Barn* close, also another close adjoining Mr. *Wright* and *Husthwaite* lane end, and with the hedge adjoining, now belonging to the other low field, also to be subject to make his own gate. I give, devise, and bequeath unto my son-in-law *Stephen Smith* the third *Blake Steell* close, adjoining Mr. *Robson's* land; also two other closes, called *Blake Steell*, adjoining the lane. Also I give, devise, and bequeath unto my son *David Windross*, now in *Jamaica*, if he ever comes back again to reside in *England*, the sum of 10*l.* a year during his natural life, to be paid out of the *Dove Acre* close by my son *Joseph Windross*. I give, devise, and bequeath unto my son *John Windross* all my other lands, messuages, and tenements not hereinbefore disposed of, and all my stock in trade, and farming dead and live stock, of whatsoever description it may be, subject to pay all my just debts as executor. Also, I do hereby appoint my son *John Windross* sole executor and residuary legatee of this my last will, hereby revoking all former and other wills by me made, and do declare this only to be my will."

1856.
MATTHEWS
v.
WINDROSS.
—
Statement.

Mr. *Rolt*, Q. C., and Mr. *Humphry*, for persons representing *John Windross*.

Argument.

The gift to *Joseph* conferred on him an estate in fee in *Dove Acre*, and estates for life only in the other property given to him.

Mr. *C. Hall*, for persons representing *Joseph Windross*.

Joseph Windross took an estate in fee simple in all the

1856.
 MATTHEWS
 v.
 WINDROSS.
 —
Argument.

property devised to him. When the testator intended to confer a life estate, he so expressed himself; and therefore the inference is, when he makes an indefinite gift, that it is intended to confer a fee simple. But in *Dove Acre* at least a fee simple was given by means of the charge upon it: *Doe v. Snelling* (a); and this strengthens the implication as to the other estates given to *Joseph*. Moreover, *Dove Acre* was most probably intended to be used in the clause creating the charge as a generic name referring to all the estates previously given to *Joseph*.

Mr. Rolt, Q. C., in reply.

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

There is only one point in this case which requires much consideration, namely, whether or not, coming to the conclusion that one of the gifts in this will, in which there are no words of limitation, confers a fee simple on *Joseph Windross*, I am bound to extend that construction, so that having construed in this manner one indefinite gift, I must hold the others to have a like effect; and I am of opinion that I cannot do so, and that it would be going further than, upon a proper construction of the testator's intention, I am warranted to go.

In any will it is necessary to construe the intention from the expressions actually used; and the Courts always, as in *Doe v. Snelling* (a), most reluctantly decide that a gift of land without words of limitation, by a will under the old law, will not pass the fee simple, though, as Lord *Mansfield* said, a testator, when he gives a house indefinitely, probably in his own mind means the same as when he gives a horse; for,

(a) 5 East, 87.

unless something is expressed in the will, it is a settled rule, that such a gift of real estate under the old law conferred only an estate for life. If there is a charge on the devisee personally, or in respect of the property devised, of payments which may make him a loser, unless he take the fee simple, in that case he is held to take the fee. That is clearly expressed by Lord *Ellenborough* in *Doe v. Snelling* (a), where the devise was—"Also I give and bequeath unto the said *George Snelling* and *Sarah* his wife" real and personal estate, "after having thereout first paid and discharged all my just debts and funeral expenses;" and Lord *Ellenborough* said, "We must read it as one entire sentence, beginning at the words, 'also I give and bequeath unto the said *George Snelling* and *Sarah* his wife,' &c., for the words 'I give and bequeath' occur only once. If then the sentence include the real as well as personal property, and the debts are to be thereout paid by the devisees, it differs this case from the case of *Denn v. Mellor* (b), and that class of cases, where the land is devised only after payment of debts: for there the thing itself is not given to the devisee till after those charges have been first satisfied. But where the devisee is to pay the charge out of the land, he must first take the interest in the land. This brings the case within that of *Doe v. Richards* (c), the doctrine and principle of which is right, though perhaps the words to which it was applied will hardly sustain the application, as was considered by many of the Judges on the decision of the case of *Moor v. Mellor* (d) in the House of Lords. That was a devise of lands, 'his legacies and funeral expenses being thereout paid;' and those words were holden to carry the fee, being considered the same as if the deviser had said, 'being by him (the devisee) thereout paid.' And if those words had been added, the application of the doctrine would unquestionably

1856.
 MATTHEWS
 v.
 WINDROSS.
 Judgment.

(a) 5 East, 87.

(c) 3 T. R. 356.

(b) 5 T. R. 558; 2 B. & P. 247.

(d) 2 B. & P. 252.

1856.
 MATTHEWS
 v.
 WINDROSS.
 —
Judgment.

have been right." That is the very case now before me. "The doctrine, however, has been long established." In a previous part of his judgment he says, "Where debts or annuities are to be paid by the devisee at all events, out of the estate in his hands, the devisee must take a fee, otherwise the charge might be greater than the estate devised, and he would be a loser." In a subsequent part, again he says, "I am clear that the debts, &c. were personal charges upon the devisees in respect of the property devised to them."

The case here is, that three estates, *A.*, *B.*, and *C.*, are devised to *Joseph Windross*, he paying out of *A.* an annuity to his brother *David*. It cannot be necessary, to prevent *Joseph* from being a loser by this gift, that he should take an estate in fee simple in estates *B.* and *C.* He cannot possibly be a loser, because the annuity is only charged on estate *A.*; and if that should be exhausted, there is no charge upon the devisee *Joseph* in respect of the annuity. Even if he exhausts estate *A.* in paying the annuity, he is no loser. The annuitant cannot come upon him for anything more, because it is out of that estate *A.* alone that his annuity is to be paid. Therefore, it is not necessary to give to *Joseph* the fee simple of estates *B.* and *C.* in order to enable him to pay this annuity.

The true answer to the argument, that this would be giving a different construction to similar words in the same will, is that that is not the effect of such a decision, because there are words charging estate *A.* with an annuity, and there are no words of charge superadded to the devises of estates *B.* and *C.*

Construing each gift according to the whole tenor of the will, I think it is impossible to hold that *Dove Acre* is a ge-

neric name by which the testator meant to describe all the subjects of his previous gift to *Joseph*.

1856.
MATTHEWS
v.
WINDROSS.

DECLARE that the fee simple of *Dove Acre* was devised to *Joseph*, but that the reversion after his death in the other estates devised to him, forms part of the testator's general estate.

Minute of
Decree.

MACRAE v. SMITH.
PANTON v. SMITH.

THESE were two administration suits.

The first was a suit by creditors on behalf &c., stating, that the testator was indebted to them for money expended by them in repairing a ship belonging to the testator, at *Moulmein* in the *East Indies*, where the Plaintiffs resided. The three executors and devisees in trust of the testator were Defendants. And the bill stated that the vouchers and documents relating to the expenses of such repairs were in the hands of the executors. Interrogatories had been filed and delivered; but no answer had been put in. The second suit had been since instituted by two of the testator's three executors against the third, and a decree had been obtained in this suit.

Creditors' Suit
—Staying Pro-
ceedings—
Terms—Disco-
very of Assets
—Payment
into Court.

On an applica-
tion being
made to stay a
creditors' suit
because of a
decree obtain-
ed in an ad-
ministration
suit subse-
quently insti-
tuted by two
of the execu-
tors against
the third, as
there was no
evidence of
the amount
of assets re-
ceived by the
executors, and
as it appeared
that the cre-
ditor's case in
the first suit
depended on
vouchers and
documents in

The Plaintiffs in *Panton v. Smith* now moved in these suits, to stay all proceedings in the suit of *Macrae v. Smith*.

Mr. *Rolt*, Q. C., and Mr. *Giffard*, for the motion.

Mr. *James*, Q. C., and Mr. *Hemming*, contra.

the hands of the executors, the Court ordered the motion to stand over until the executors had put in their answer in that suit.

Semble, that a creditor whose suit in equity is stayed, as well as a creditor who is restrained from prosecuting an action at law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into Court.

1856.

MACRAE
v.
SMITH.
PANTON
v.
SMITH.

Argument.

The decree obtained is not a creditors' decree.

Even where there is such a decree, this Court only grants an injunction to stay a creditor from suing the executor at law, upon the terms of the executor making an affidavit as to the funds in his hands, and paying the amount into Court: *Paxton v. Douglas* (a). Moreover, the Plaintiffs in *Macrae v. Smith* cannot prove their claim in that suit, unless they obtain an answer from the Defendants, and discovery of the documents in the Defendants' hands. [Mr. Rolt, Q. C.—They may examine the Defendants on oath, and make them produce documents.] [VICE-CHANCELLOR—I doubt whether a creditor, coming in under a decree, could obtain a discovery of documents from the parties in that suit.] Where additional relief beyond the mere administration decree is asked in the suit sought to be stayed, the Court will not stay the suit as to such relief: *Dryden v. Foster* (b), *Budgen v. Sage* (c). At any rate, if our suit is stayed the prosecution of the decree in the other suit should be given to us: *Hawkes v. Barrett* (d).

Mr. Rolt, Q. C., in reply, cited *Golder v. Golder* (e).

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

In the case of *Clarke v. Lord Ormond* (f) Lord Eldon laid down the principle upon which these orders are made. He expressed some surprise that the Plaintiff in that case, who was a legatee, should apply, and intimated that it was the duty of the executors to make the application; and he afterwards said, "The first question is, what would be done if this application had been made by the executors? and I

(a) 8 Ves. 520.

(b) 6 Beav. 146.

(c) 3 M. & C. 683.

(d) 5 Mad. 17.

(e) 9 Hare, 276.

(f) Jac. 122.

do not mean any reflection on them when I say, that I think they ought to have made it. Ever since the case of *Morris v. The Bank of England* (a), it has been the settled doctrine of the Court, that, where a decree has been obtained for payment of creditors, it is in the nature of a judgment for all; and the Court therefore will not permit any particular creditor, by proceeding at law, to disturb that administration of the assets which this Court, in the execution of that judgment for all the creditors, will decree; and the Court not being in the habit of taking the word of any one as to the amount of the assets or of the debts till it has a report finding what they are, and considering that equal justice must be done to all, will not in the meantime allow any to touch the assets. Even if the creditor has got a judgment before the decree, though he may come in and prove as such, he must not take out execution."

He subsequently said, "It afterwards appeared to me that many unrighteous proceedings were introduced by these suits; and I therefore laid down the rule, that when the executor applied for such an injunction, he should enable the Court, if in its discretion it should think fit, to order him to pay in the balance in his hands. It was then asked, why did not the creditors make the executor set forth the balance in his answer, so as to enable a motion for payment of it to be made? But the answer to that was, that the creditor was generally friendly to him; and that it was probably the common purpose of both that the money should remain in his pocket. The Court therefore called upon him to set forth the amount." Those observations apply in terms to a case where the bill is filed by a creditor; but the difference between that case and this is too thin for me to rely upon it; and I think, that, in a case like this, where an executor obtains a decree for administration against his co-executors, that is a decree for the benefit of all the creditors of the testator. At the same time the Court, on an application for an injunction

1856.
MACRAE
v.
SMITH.
PANTON
v.
SMITH.
Judgment.

(a) Ca. t. Talbot, 217; 4 B. P. C. 287.

1856.
 {
 MACRAE
 v.
 SMITH.
 PANTON
 v.
 SMITH.

Judgment.

to stay proceedings at law by a creditor, will order the executor to make an affidavit of the amount of assets in his possession, and to pay the balance into Court; and I cannot see why a creditor in equity is not entitled to the same relief.

Then, in this case, the Plaintiffs in *Macrae v. Smith* have made a case, which it appears from the bill depends on vouchers and documents which are in the hands of the Defendants in that suit; the executors of the testator. I do not think that it would be right that this suit should go on to the hearing; but I must order that the present motion should stand over until the Defendants have answered, and then I shall know who ought to have the conduct of this litigation.

JOHNSTONE v. HALL.

*F.b. 1 th &
 March 11th.*

*Injunction—
 Contract—
 Specific Performance—
 Remainderman—Nuisance—Noxious Trades—
 Acquiescence.*

In a case resting simply upon covenant, if the party

seeking specific performance be entitled in possession, he has a right to the enjoyment of the property *modo et forma* according to his covenant; but if he be entitled in remainder only, he must shew that he has sustained some material damage by reason of the breach to entitle him to relief of this nature.

Demise of land for 999 years, at a yearly rent of 33*l.* odd, and covenant by lessee not to carry on, or suffer to be carried on, in any building to be erected on the premises, any of several noxious or objectionable trades and employments, "or any other trade, business, or employment whatsoever," but to use the premises solely for private dwelling-houses. Lessor died, having devised the premises to one for life, and to the Plaintiffs in remainder. Defendant, as sub-lessee, carried on upon the premises a school for girls. A bill for an injunction, living the tenant for life (who was not a Plaintiff), dismissed with costs, upon the ground that, having regard to the circumstance that the Plaintiffs were merely entitled in remainder, the relief prayed was too minute, there being no case of waste, but only a possibility of the respectability of the neighbourhood being in some measure affected; and the argument from acquiescence could not apply, the Plaintiffs having no right of re-entry.

But *held, obiter*, that in a gross case, e. g. a noxious trade, an injunction would have been granted, although the Plaintiffs were not entitled in possession.

houses, with suitable offices and outbuildings, and to keep the same in proper repair; and also, that he, *Jacobs*, his executors, administrators, and assigns would not erect or make or carry on, or suffer to be erected or made or carried on at any time upon the premises, or in any edifice or building to be erected thereon, any of several noxious or objectionable buildings, manufactories, trades, and employments in the indenture specified, "or any other manufacture, trade, business, or employment whatsoever, or commit, permit, or suffer any nuisance or annoyance whatsoever in or upon the said premises, it being thereby expressly agreed that the premises should at all times thereafter be used and enjoyed solely as and for a private dwelling-house or private dwelling-houses."

1856.
JOHNSTONE
v.
HALL.
Statement.

John Hawkins died in 1841, having devised all his real estate, including his interest in the premises comprised in the lease, to trustees, to the use of his son *John Heywood Hawkins* for life, sans waste, with remainder to trustees to preserve contingent remainders, with remainder to the use of the first and other sons of *John Heywood Hawkins* successively in tail male, with remainder to the use of his first and other sons successively in tail general, with remainder to the use of the testator's daughter, the Plaintiff *Mary Anne Johnstone*, (then *Mary Anne Hawkins*, spinster), and her assigns, for life, with remainder to trustees to preserve contingent remainders, with remainder to the use of her first son in tail general, with remainders over.

John Heywood Hawkins was still a bachelor.

Jacobs' interest in the premises became vested in the Defendant *Hall*, who underlet a house which had been built thereon by *Jacobs* or his assigns, to the Defendant *Armstrong*, for a term of years determinable at Christmas, 1856. *Armstrong* commenced and carried on, in the house comprised in his underlease, a school for the education of girls.

1856.
 JOHNSTONE
 v.
 HALL.
 ———
Statement.

The bill was filed by *Johnstone* and *Mary Anne* his wife, and their eldest son (an infant), against *Hall*, *Armstrong*, and *John Heywood Hawkins*. It contained the following averment:—"The carrying on of the said school in and upon the said house and premises is productive of great inconvenience and annoyance to other tenants of the Plaintiffs, and is detrimental to the property of the Plaintiffs, as well in consequence of such inconvenience and annoyance as by lowering the character of the said house and of the adjoining property, and thereby the estate and interest of the Plaintiffs in the said property will be materially injured, unless the Defendants *Hall* and *Armstrong* are restrained from carrying on the said school." The bill prayed an injunction to restrain the Defendants *Hall* and *Armstrong* from using, following, exercising, or carrying on, in or upon the said house and premises, the trade, business, or employment of a school, or any other trade, business, or employment whatsoever, and from using and enjoying the said house and premises otherwise than as a private dwelling-house.

The cause now came on to be heard upon motion for a decree.

Argument.
 ———

Mr. *Rolt*, Q. C., and Mr. *Freeling* for the Plaintiffs:—

The lease of 1838 contains an express covenant not to carry on any trade, business, or employment whatsoever, and to use the premises solely as a private dwelling-house. This covenant has been broken by the Defendants. The Court, therefore, will grant the injunction, without putting the Plaintiffs to prove damages.

[The VICE-CHANCELLOR.—The question is, whether, during the preceding tenancy for life, the Plaintiffs have such an interest in the covenant as to maintain this bill.]

But it is a question of waste; if this trade is allowed others will follow, and the whole character of the neighbourhood will be changed. It will then be too late for the Plaintiffs to ask to be reinstated. To reinstate them will be impossible. If the Plaintiffs are not entitled to this relief *Portland Place* might become as *Baker Street*, and the remainderman would have no remedy.

1856.
JOHNSTONE
v.
HALL.
Argument.

They cited *Shadwell v. Hutchinson (a)*, *Jesser v. Gifford (b)*, and *Daniel v. North (c)*.

Mr. *Dickenson* for the Defendant *John Heywood Hawkins*, who had participated in the alleged breach of covenant, took no part in the argument.

Mr. *Bazalgette* for the Defendant *Hall* :—

The Plaintiffs have only a contingent remainder expectant upon the determination of the life estate of *John Heywood Hawkins*, and of estates tail in his sons should he have any, and that is an interest too inconsiderable to warrant this application. In all the cases cited, parties having a present interest in possession were Plaintiffs. Here the tenant for life is not a Plaintiff; on the contrary, he has waived his right.

Nor are the Plaintiffs entitled upon the ground of waste. Even in cases of waste the Court has a discretion. Permissive waste would not be restrained upon a bill by a mere remainderman: *Powys v. Blagrove (d)*, and this case cannot be put higher. A school, as Lord *Cranworth* says in *Kemp v. Sober (e)*, is not a permanent damage.

Mr. *Eddis*, in the absence of Mr. *Daniel*, Q. C., for the Defendant *Armstrong* :—

(a) 1 M. & M. 350.

(b) 4 Burr. 2141.

(c) 11 East, 372.

(d) Kay 495; S. C., 4 De G. Mac. & G. 448.

(e) 1 Sim. N. S. 517.

1856.
 {
 JOHNSTONE
 v.
 HALL.
 —
 Argument.

The bill is in effect for specific performance, which is granted upon this ground, and upon this ground only, viz. that the remedy at law is inadequate—a ground which presupposes that there is some remedy, that the Plaintiffs would have some action, at law. Now, a remainderman has no action at law upon a breach of covenant, unless he can shew some special damage to his reversionary interests: *Young v. Spencer* (a), *Baxter v. Taylor* (b), *Jackson v. Pesked* (c). And here the Plaintiffs have shewn no such damage. All the cases cited on their behalf assume that the inheritance would necessarily be injured.

Whatever might be the case if this were a noxious trade, it is impossible to imagine, that, when the Plaintiffs come, if they ever come, into possession of this property, the neighbourhood will be found to have been depreciated by the circumstance, that, at some previous time, a ladies-school was kept in the house in question.

Mr. *Freeling* in reply :—

Either the Plaintiffs have a remedy at law, and if so, they have the remedy they now contend for in this Court, as ancillary to a Court of law; or they have no remedy at law, and in that case, unless this Court gives relief, there will be a wrong without a remedy; the property will come to the Plaintiffs with its character totally changed, covered with shops of butchers and tallow boilers. [The VICE-CHANCELLOR.—I should be with you if this were the case of such a shop; but does it follow, that, because you would be entitled to an injunction in a gross case, therefore you are entitled to the same relief in a case which can do no harm whatever? Coming as a reversioner in a case which is not a strong case, such as you have supposed, must you not shew damage?] Not

(a) 10 B. & C. 145. (b) 4 B. & Ad. 72. (c) 1 M. & Selw. 234.

if the act in question is a clear breach of an express covenant: in such a case mere apprehension of damage is sufficient. The relaxation of the covenant in this instance—even admitting it to be a harmless instance (which it is not)—would result in a relaxation of it in other instances, including the most offensive trades. The Plaintiffs would then be estopped by acquiescence, or, if not, it would be too late to seek redress when the neighbourhood was irreparably injured.

If this is not strictly a case of waste, it is at least analogous to such a case. The Court will read this covenant as having been obtained by the testator for the benefit of the whole inheritance.

Judgment reserved.

1856.
JOHNSTONE
v.
HALL.
—
Argument.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have not been able to find any case precisely similar to the present, though many approach near to it.

Judgment.
—
March 11th.

I think it clear that the Plaintiffs have no remedy at law in respect of the injury alleged to have been committed. They are not precluded from suing at law by the mere circumstance of their being reversioners. Under the statute 32 Hen. 8, c. 34, they would be entitled at law to the benefit of the lessee's covenants. In *Isherwood v. Oldknow* (a), where the question arose upon a lease under a power in a will, *Bayley, J.*, held that the Act gave the benefit of the covenants to the persons successively entitled. But, being reversioners, the Plaintiffs are precluded from suing at law, unless they can allege and prove special damage to themselves in respect of their interest in the reversion. That was

(a) 3 M. & Selw. 382, 404.

1856.
JOHNSTONE
v.
HALL.
Judgment.

laid down expressly in *Jackson v. Pesked* (a) and *Baxter v. Taylor* (b), as well as in earlier cases. The damage so to be alleged and proved may be of various kinds. It may be material injury either to the property itself or to the title of the party suing as reversioner. In one case, *Young v. Spencer* (c), which was cited in *Baxter v. Taylor*, the damage was by opening a certain door, which it was argued might occasion a confusion of boundary, and so affect the evidence of title. That is the only case I have found in which so slight a circumstance has been held to furnish a possible ground for special damage. But all the cases agree, that, in an action by a reversioner, special damage must be alleged and proved.

In this case no special damage is proved. Damage is alleged in the bill in these words:—"The carrying on of the said school in and upon the said house and premises is productive of great inconvenience to other tenants of the Plaintiffs, and is detrimental to the property of the Plaintiffs, as well in consequence of such inconvenience and annoyance as by lowering the character of the said house and of the adjoining property; and thereby the estate and interest of the Plaintiffs in the said property will be materially injured, unless the Defendants *Hall* and *Armstrong* are restrained from carrying on the said school." But with regard to the damage so alleged, the evidence is all one way. Indeed it is conceded that there is no evidence of such damage as is alleged in the bill.

It does not, however, follow from the mere circumstance of the Plaintiffs being without remedy at law, that they are therefore without remedy in this Court. In other cases of this character a party who, owing to the peculiar doctrines of Courts of law, can have no relief at law, may be relieved in equity. This is especially the case with reference to the

(a) 1 M. & Selw. 234.

4 B. & Ad. 72.

(c) 10 B. & C. 145.

doctrine of Courts of law respecting covenants running with the land; and it is now quite settled—as was stated by the L. J. *Knight Bruce* in *Coles v. Sims* (a), referring to *Tulk v. Moxhay* (b), which he says was neither the first nor yet the last case in which it has been so held—that this Court does not feel itself embarrassed by the consideration whether a covenant does or does not run with the land, but looks upon it as a contract which, in either case, may afford a ground for relief.

'1856.
JOHNSTONE
v.
HALL.
—
Judgment.

Here I am bound to consider the covenant as amounting to an agreement between the parties as to the user of the land, and the question is whether the case is such as entitles the Plaintiffs, in their peculiar position as reversioners, to the relief prayed.

If the Plaintiffs were now in possession of the property subject to the lease, no doubt, according to the decision in *Kemp v. Sober* (c), I must have held that the carrying on of a school was a breach of the covenant, which is, that the lessee should use the premises as a dwelling-house only, and there must have been a decree for specific performance of the agreement as between Plaintiffs, so situated, and the Defendants. But the Plaintiffs are not in that position. They are in the position of reversioners. And what they call upon me to hold is, in effect, that all persons who may successively come into the possession and enjoyment of the property, subject to the lease, are entitled during the existence of preceding estates to have this agreement specifically performed, and to insist on the occupation of the property modo et formâ contemplated by the provisions of the lease.

Again, if the Plaintiffs, although merely entitled in reversion, were in a position to shew that the Defendants were carrying on upon the premises some noxious trade, which

(a) 5 De G., Mac. & G. 8.

(b) 11 Beav. 571; 2 Ph. 774.

(c) 1 Sim. N. S. 517.

1856.
JOHNSTONE
v.
HALL.
—
Judgment.

would occasion such damage to the character of the Plaintiffs' property as seriously to injure it, I should have no hesitation in saying, that such a state of circumstances would bring their case within the principle of the cases at law, which all proceed upon the ground that special damage has been done to the reversioner. But neither are the Plaintiffs in this position. They have shewn no such damage. All they have shewn is, that one of the Defendants is carrying on a school, which, they allege, but do not prove, will affect the respectability of their property; and they contend that they are entitled, by virtue of the covenant, to have the whole of that property secured in the state of respectability for which the covenant professes to provide.

I have looked in vain for an instance of an action by a reversioner for damages upon such a ground as this. In *Garth v. Cotton* (a), the leading case in reference to the relief given in this Court to a reversioner, Lord *Hardwicke*, after noticing all the previous authorities, concludes, that in a case where, there being no remedy at law, the Plaintiff would sustain a wrong if equity did not interfere, equity will, for that reason, interfere to give relief, because otherwise there would be a wrong without a remedy; and he decided that case accordingly. But, in the same case he admits that the Court should not extend such interference to trifling matters. Referring to his own decision in the case of *Jesus College v. Bloom* (b), he says, "I was of opinion that, at the utmost, it was in the discretion of the Court; and if the college had a right, they might clearly bring an action of trover at common law; and, it being a matter of small value, I did not think fit to countenance such bills in this Court, after the lease expired."

In this case there is no remedy at law, and the question is, whether there is such an injury as this Court ought to be called on to redress.

(a) 1 Dick. 183.

(b) 3 Atk. 262.

In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property *modo et formâ* according to his covenant; but if he be entitled in remainder only, I think he must shew that he has sustained some material damage by reason of the breach, to entitle him to relief of this nature.

1856.
JOHNSTONE
v.
HALL.
Judgment.

It was argued, that the Court will never inquire what is the amount of special damage incurred, but will consider the parties to be bound by their contract; and it is true, that, if the Court sees that the actual enjoyment of the property by one of the parties to the contract is interfered with in any manner contrary to what he stipulated for, the Court will not enter into his reasons for seeking to have that enjoyment secured to him; but if the application is by a reversioner, I think the Court is bound to consider what amount of interest he has in the question.

Nothing so small as the interest of the reversioner in this case could well be presented to the consideration of a Court of equity. I am asked, on a lease for 999 years, at a yearly rent of 33*l.* 12*s.* 8*d.*, in which the reversioner is interested subject to a preceding life estate,—the rent being amply secured,—to grant an injunction in order to keep the property for the reversioner in the exact state provided for by the lessee's covenants. I rest my judgment on the ground that the relief asked is so minute that the Court will not interfere, as the Plaintiffs are not in possession of the property, and there is no case of anything like waste, but only a possibility of the respectability of the neighbourhood being in some measure affected. I feel myself at liberty to inquire whether there is any such injury as to authorise me to interfere by injunction, and I think that there is not.

Another argument was, that the Plaintiffs, should they

1856.
 }
 JOHNSTONE
 v.
 HALL.
 —
Judgment.

now stand by, will at some future time be deemed to have acquiesced in what the Defendants are doing with the premises; and in support of this argument cases were cited in which adverse rights had been acquired by opening windows, and the like, with the knowledge of the reversioner, who was so far held to have acquiesced, that a title of this kind might be acquired against him as well as against the party who had the immediate interest in the estate. But in all those cases the adverse right was acquired by a stranger to the estate. This is not a case of that character. This is a case of a covenant; and in a case of a covenant no such consequence can follow. The only acquiescence there can be in respect of a breach of covenant, is where there is a power of re-entry. The lessor, by waiving his right of re-entering, may acquiesce in a breach of the covenant; but even in that case express acquiescence must be proved: for, in *Doe v. Allen* (a) it was held, that, although the lessor lived next door to the lessee, and saw that the whole property was being converted into a shop, yet he was not precluded from re-entering, *Mansfield*, C. J., saying,—“I do not know how it is possible to help this Defendant. The lessor having let to *Dore* with a covenant not to exercise certain trades, *Dore* underlets to the Defendant, and the Defendant trades contrary to the covenant; the Plaintiff lives next door, and must be taken to have known the alterations in the state of the premises. Supposing no money to have been laid out in improvements, and of that there is no evidence, the suffering him to go on is an indulgence to the tenant; after a time the lessor brings an ejectment, and what you ought to prove is, that he consented to the change; now you have not shewn that he has since, either directly or indirectly, received any rent; and if he had, it is probable he gave *Dore* a receipt, and *Dore* would have produced it to uphold the beneficial lease.” Therefore, the only principle

(a) 3 Taunt. 78.

on which acquiescence under covenants of this kind can be relied on, is where moneys have been actually spent in alterations on the property. Here, all that has been done is, that the lessee has used the house as a ladies school.

1856.
JOHNSTONE
v.
HALL.
Judgment.

I decide this case without placing any reliance upon what was alleged in argument for the Defendants,—that *John Hawkins*, the testator, allowed schools to be carried on upon property held under leases of the same nature, and immediately adjoining the premises in question. That allegation was not proved. And even if such a circumstance could have brought the Defendants' case within that of the *Duke of Bedford v. The Trustees of the British Museum* (a), it forms no part of this case.

My opinion is, that the Plaintiffs, when they come into possession, may insist, if they think proper, on their right to have the same relief as was granted in *Kemp v. Sober* (b); but I must now dismiss their bill, with costs.

(a) 2 M. & K. 552.

(b) 1 Sim. N. S. 521.

1856.

April 12th &
14th.

PICKFORD v. BROWN.

BROWN v. BROWN.

*Will—Con-
struction—Re-
moteness—
Freeman of
London—Cus-
tom—Costs.*

A gift by will of real and personal estate to trustees, upon trust to pay half the income to *E.* for life, and after her death to her child or children equally; the shares of sons to be vested in them on attaining twenty-five, and of daughters on attaining that age or day of marriage, which should first happen, and in the meantime to be applied for their maintenance, with survivorship in case of the death of any child before twenty-five or marriage respectively, with a similar gift to *S.* and her children of the other moiety, and a gift over in case of the death of either *E.* or *S.* without leaving issue, or leaving such and they should all die under twenty-five:—*Held*, that the limitations to the children of *E.* and *S.* were void for remoteness.

JOSEPH BROWN, a freeman of the city of *London*, by his will dated in 1844, after certain specific gifts in favour of his wife and son *Walter*, devised and bequeathed all his residuary real and personal estate to his wife and two other persons as trustees, upon trust to pay certain legacies to his daughters *Elizabeth* and *Catherine*, and to pay half the income of his residuary real and personal estate to his daughter *Elizabeth* for life, for her separate use. And the will continued:—

“ And from and after her decease, upon trust, as to the said moiety of the said rents, interest, dividends, and annual produce, to stand and be possessed thereof for all and every the children and child of her the said *Elizabeth Brown*, in equal shares and proportions, if more than one; and if but one, then for such only child, the share or interest of every son to be vested in him on his attaining the age of twenty-five years, and the share or interest of every daughter to be vested in her at that age or on the day of her marriage, whichever event should first happen, the said shares or share of such children or child in the meantime to be either laid out and applied by my said trustees for their, his, or her maintenance, education, and advancement in life, or, at the discretion of my said trustees, be allowed to accumulate for

Held also, that the direction for maintenance was altogether void.

The testator was a freeman of the city of *London*—*Held*, that the property, the gift of which had failed, was not subject to the custom of *London*, but must be divided according to the Statute of Distributions.

Two suits having been instituted to obtain the decision of the Court upon the construction of the will, one as to the testator's real, and the other as to his personal, estate:—*Held*, that the costs of both must be borne by the personal estate in the first instance.

their, his, or her benefit; and if any of such children being a son or sons shall die under the said age of twenty-five years, or being a daughter or daughters shall die under that age unmarried, then the part or share of every of them so dying shall go to the survivors or survivor of them, and their, his, or her executors, administrators, or assigns, and shall be vested in them, him, or her, at the said age of twenty-five years or day of marriage, in the same manner in all respects as their, his, or her original shares or share." And he gave the other moiety to his daughter *Sophia* for life, and then to her children in the same manner. And in case of the decease of either of his said daughters in the lifetime of the other without leaving issue, or leaving such and they should all die under the age of twenty-five years, then the testator directed that the share of her so dying should be divided in equal moieties, and one of such moieties should go and belong to his surviving daughter for her life, and after her death to her issue, to be paid and payable to them in the same manner and under the same limitations in all respects as her original share; and the other moiety to his son *Walter* for life, and after his death to his issue as therein mentioned; and in case of the decease of both his said daughters, each having issue, then he directed that his said trustees should sell and convert the residue of his real and personal estate and effects, and invest the proceeds and hold the same upon trust to divide the same equally between and amongst all the children of his said two daughters who might be then living, per capita and not per stirpes, the shares of each of the said children to be vested and payable on their respectively attaining the age of twenty-five years; and should either of such children be under that age at the death of the survivor of his said daughters, then to pay and apply the dividends arising therefrom in equal shares and proportions for the maintenance of the children or child of his said two daughters who should be so under age, or, at the discretion of his said trustees, to allow the same to accumulate for their

1856.

PICKFORD

v.

BROWN.

BROWN

v.

BROWN.

Statement.

1856.
 PICKFORD
 v.
 BROWN.
 BROWN
 v.
 BROWN.
 ———
Statement.

benefit, until such children or child should attain the age of twenty-five years, and when and as they should respectively attain that age, then he directed his said trustees to pay or transfer to them their respective shares of and in the said trust moneys and premises, to and for their absolute use and benefit, with the like benefit of survivorship in case of the death of either of them without issue, and in the same manner in all other respects as was thereinbefore mentioned with respect to the moieties of his said two daughters; but in case of the decease of both his said daughters without leaving issue, or leaving such and they should all die under the age of twenty-five, then he directed his said trustees to stand possessed of all the said trust fund, estate, and premises, upon trust for his said son, his heirs, executors, administrators, and assigns, and to be paid and transferred to him on his attaining the age of twenty-five years, with the like limitations over in favour of his issue in case of his death in all respects as thereinbefore expressed.

The testator died in 1845, leaving his widow and his three children named in his said will surviving.

The Plaintiff in *Pickford v. Brown* was the administrator of *Sophia*, who had died; and he filed the bill in that suit, claiming to be entitled to a share of the testator's personal estate, on the ground that the limitations to the children of the testator's children were void for remoteness; and that, subject to the life interests given by the will, the property must devolve as on an intestacy.

Brown v. Brown was a suit to administer the trusts of the testator's real estate.

The first question raised in the suits was, whether the limitations in favour of the grandchildren of the testator were or were not void for remoteness.

Mr. *Chandless*, Q. C., and Mr. *Baggallay*, for the Plaintiff in the first suit; and

Mr. *Rolt*, Q. C., and Mr. *H. T. Bristowe*, for other parties in the same interest, submitted, that all the limitations, both as to the real and personal estate except the life estates, were void for remoteness.

1856.
 PICKFORD
 v.
 BROWN.
 BROWN
 v.
 BROWN.
 Argument.

Mr. *Daniel*, Q. C., for the infant children of one of the daughters, submitted, that, although under the limitation in favour of the grandchildren, their shares were not to vest till twenty-five, and therefore that the limitation in its broadest sense might be void, yet that there was a valid trust for maintenance and accumulation, which might be good for twenty-one years from the death of the parent or parents of such grandchildren respectively, as they must all be in esse at the deaths of their respective parents.—He cited *Saunders v. Vautier* (a).

VICE-CHANCELLOR SIR W. PAGE WOOD held, that the direction to apply the income for maintenance must be treated as forming part of the gift to, or trust in favour of, the grandchildren; and that the trusts and limitations in favour of the grandchildren, as well relating to the real as to the personal estate, were void for remoteness.

A question then arose as to whether the widow of the testator, a freeman of the city of *London*, was entitled to two-thirds of that proportion of the personal estate as to which the limitations beyond the life estates were held to be void, or whether she was entitled under the custom to four-ninths of such property.

(a) Cr. & Ph. 240.

1856.
 PICKFORD
 v.
 BROWN.
 BROWN
 v.
 BROWN.

Argument.

Mr. *James*, Q. C., and Mr. *Cairns*, Q. C., for the widow, contended, that she was entitled to four-ninths.—They cited and referred to *Beard v. Beard* (a), *Lawson v. Lawson* (b), *Fitzgerald v. Field* (c), stat. 2 W. & M. c. 2; 11 Geo. 1, c. 18, s. 17.

Mr. *Chandless*, Q. C., and Mr. *Baggallay*, contra, cited *Wheeler v. Sheer* (d), *Wilkinson v. Atkinson* (e).

Mr. *Rolt*, Q. C., Mr. *H. F. Bristowe*, Mr. *Daniel*, Q. C., Mr. *Belton*, and Mr. *F. S. A. Williams*, for other parties.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The point which I reserved for consideration was, whether the custom of *London* had any effect on certain personal estate, as to which there was a partial intestacy by reason of the property having been given in a manner which rendered the gift void for remoteness.

Before referring to the authorities cited on the effect of a bequest by virtue of the statutes which enable testators in *London* and *York* to dispose of their property by will, I wish to consider the question on principle. It is very clear, from the result of numerous decisions, that, on the death of a freeman of *London*, two-thirds of his personal estate are no longer his property. Before the stat. 11 Geo. 1, c. 18, he ceased, on his death, to have any power over two-thirds of his personal estate; and one of such two-thirds went to his children, and the other one-third to his widow. The remaining one-third was called the dead man's share, and over that alone had he any testamentary power. This seems to have been settled, after some little doubt whether he had not at

(a) 3 Atk. 72.
 (b) 7 Bro. P. C. 511.
 (c) 1 Russ. 416.

(d) Mos. 303.
 (e) T. & R. 255; Wms. Executors, 1309.

least the power of regulating the mode in which the children should take their share, and whether he could not give it over in case of their deaths. That point was decided in *Pusey v. Desbouvrie* (a), and in the case of *Biddle v. Biddle* there cited in a note; in which it was finally determined that a freeman of *London* had no right to meddle with the two-thirds of the widow and children, and his only power was over the dead man's part. He had no ownership in the orphanage share at all, although his creditors had a claim against it for their debts.

When the Statute of Distributions, 22 & 23 Car. 2, c. 10, passed, a remarkable result followed. It expressly exempted the property of a freeman of *London* or *York* from its operation (sect. 4). That is shewn very clearly by the subsequent Act. The effect was, that the statute had no operation on the orphanage part, and a question arose whether it had any operation on the dead man's share; and in consequence of these doubts, it was necessary to pass another Act with reference to that share, because the common law authorities had held, that an administrator under the statute of Edward, as well as an executor, was the sole owner, and was not compellable to distribute. That was the occasion of passing the subsequent statute, 1 Jac. 2, c. 17; sect. 8 of which was as follows " Provided, and it is hereby, for the determining some doubts arising upon the Acts aforementioned for the better settling intestates' estates, enacted and declared, that the clause therein, by which it is provided that that Act, or anything therein contained, should not anyways prejudice or hinder the customs observed within the city of *London* and province of *York*, was never intended nor shall be taken or construed to extend to such part of any intestate's estate, as any

1856.
PICKFORD
v.
BROWN.
BROWN
v.
BROWN.

Judgment.

(a) 3 P. W. 318.

1856.
 PICKFORD
 v.
 BROWN.
 BROWN
 v.
 BROWN.
 ———
Judgment.

administrator by virtue only of being administrator, by pretence or reason of any custom, may claim to have to exempt the same from distribution; but that such part in the hands of such administrator shall be subject to distribution as in other cases within the said Act." And, accordingly, the dead man's share was always distributed according to the ordinary form, as under the Statute of Distributions, without any reference to the custom. Then the 11 Geo. 1, c. 18, was passed; and by sect. 17 it was enacted, that "it shall be lawful to and for all and every person and persons, who shall at any time from and after the 1st day of June, 1725, be made or become free of the said city, and also to and for all and every person and persons who are already free of the said city, and on the 1st day of June, 1725, shall be unmarried, and not have issue by any former marriage, to give, devise, will, and dispose of his and their personal estate and estates to such person and persons and to such use or uses as he and they shall think fit."

On principle, it would seem to me, that the effect of those words was, that, when the will was made and the property passed, the whole estate was placed in the position in which the dead man's part was before, and it was made the estate of the testator; and by making a will under the Act, he acquired full control over all, as he before had over the dead man's part. The doctrine of resulting trust is, that, where the deceased owner of an estate has parted with it to a trustee, and the full trust is not declared, it results to the estate of the testator. That would hardly bring it back to the widow and children as their orphanage share. Their claim is, that the property does not belong to the testator's estate, but here it belonged to the testator, and they claim through him. The custom is against the testator being the owner for testamentary purposes, and therefore, when he has availed himself of the statute, he has displaced the custom, and the resulting trust is a trust for him, so far as

his testamentary disposition to the trustee fails from the failure of the trust.

In the case of *Wheeler v. Sheer* (a) the case of gavelkind and borough *English* lands is suggested, where, the party not having given away the whole interest, it resulted to him as owner, and if he died, it would go to his heirs in gavelkind or borough *English* respectively. But in this case the effect is, that the part undisposed of is let loose, and the claim of the widow to it is not through him, but against him, as being entitled to the customary share; and the question is, whether it be possible to make that claim, when the person so claiming the share is obliged to admit the ownership of the testator, and thus finds the theory of resulting trust adverse to her claim, which must rest upon the ground that the testator was not owner of the orphanage share. It struck me that it might have been suggested, that this should be treated as though it were a power by statute, and as having been partially executed. But, even in that view, there are questions behind. But the fact is, this is not to be treated as a power, but as a property in the testator under the statute.

Another difficulty is this: Assuming that the testator, in execution of the power given to him by the 11 Geo. 1, c. 18, had actually given one-third of his personalty to his wife, and one-third to his children, and that the other one-third, by lapse or otherwise, devolved as upon an intestacy; could it be said that this which is the dead man's part would not have been touched by his representative; and that, though he had given two-thirds according to the custom, the operation of the custom must be introduced as to the remaining third. This is the broadest case that can arise; but there are cases in which the testator may have given

1856.
PICKFORD
v.
BROWN.
BROWN
v.
BROWN.
Judgment.

(a) Mos. 302.

1856.
 PICKFORD
 v.
 BROWN.
 BROWN
 v.
 BROWN.
 —
Judgment.

interests to the wife and children so as to satisfy the custom to a certain extent, and is the whole of his own one-third also to benefit the persons entitled under the custom? No such case seems ever to have arisen. Lord *Hardwicke*, in *Beard v. Beard* (a), did certainly say:—"If this is an intestacy, it is admitted by the Defendant's counsel it must be distributed; but they have insisted here is a will which, as it is proved, must stand, and therefore there is no intestacy, at least of the personal estate; but if there is an intestacy at all, there is no difference in point of law between an absolute and a qualified intestacy. This being the rule, the executor, who from this qualified intestacy is now become a trustee, must distribute in this case according to the custom of the city of *London*." It is unfortunate that the case of *Wheeler v. Sheer* (b) was not cited on that occasion. I think that it is impossible to find any distinction between the two statutes, certainly none was made by Lord *Hardwicke*. The point was very ably argued in *Wheeler v. Sheer*, according to the report in *Moseley*, and the Lord Chancellor said—"By law the executor is entitled to the whole personal estate, which is as old as the custom which is the law of that part of the kingdom, and which the statute takes away only where there is a will; if one then makes a partial will and no executor, the residue will be subject to the custom; but here are executors, and the residue of the personal estate is devised to them, so this case is within the express words of the statute; then the question is, for whom the executors are to be trustees, not for those who are to take by the custom by the very letter of the statute, but for those who are entitled by the general law." It is said, that those words, "the letter of the statute," refer to that statute, 2 W. & M. c. 2, which related to property in *Yorkshire*, and by which, after giving a power of disposition, it was enacted, that "the widows, children, and other the kindred of such testator or testators,

(a) 3 Atk. 72.

(b) Mos. 302.

shall be barred to claim or demand any part of the goods, chattels, or other personal estate of such testator or testators, in any other manner than as by the said wills and testaments is limited and appointed." Now, persons who claim in this way do not claim in any other manner than that. They claim because it is not appointed. The property is given to the executor, it is true, but the heir in a like case says, "I do not claim against the will, I claim because there is no will." So here, these words were simply unnecessary, they might say, under that statute; we admit the whole will, but it does not dispose of the property; and all we claim is the property subject to distribution, because in fact the will has not disposed of it. It appears a very thin distinction, and one not made by Lord *Hardwicke*. The Judge who decided *Fitzgerald v. Field* (a) considered that *Beard v. Beard* (b) and *Wheeler v. Sheer* (c) cannot stand together; and I concur in that decision, and I think that on principle there is a sound ground for the decision of Lord *King* in *Wheeler v. Sheer* (c), because in truth the property having been disposed of by 11 Geo. 1, c. 18, the testator makes it his own by his will, and then the custom is at an end.

1856.
PICKFORD
v.
BROWN.
BROWN
v.
BROWN.
Judgment.

Another point suggested in argument was, that it might wholly be disposed of by the late statute as to intestates' estates; but that statute is rather adverse to that conclusion. In every case, when given to the executor, it is under that statute to be distributed according to the Statute of Distributions, and that statute never notices the custom, it is wholly out of it.

I should be sorry to rest my decision upon that narrow view; but I do not think the cases of *Beard v. Beard* (b) and *Wheeler v. Sheer* (c) can stand together, and I must therefore follow the latter.

(a) 1 Russ. 416.

(b) 3 Atk. 72.

(c) Mos. 303.

1856.

PICKFORD

v.

BROWN.

BROWN

v.

BROWN.

Costs.

The following question as to the costs was then raised:

Mr. *Rolt*, Q. C., and Mr. *H. F. Bristowe*, submitted, that the costs of the suit of *Brown v. Brown*, as well as those of *Pickford v. Brown*, ought to be paid out of the residuary personal estate, as the difficulties were of the testator's own creation, and as the personal estate was primarily the fund to bear all costs, except where there was a mixed fund, arising from real and personal estate, when the costs would be apportioned: *Foster v. Christian* (a).

Mr. *Chandless*, Q. C., and Mr. *Baggallay*, contra, contended, that the costs of the suit of *Brown v. Brown*, which related solely to the real estate, ought to be paid by the heir: *Eyre v. Marsden* (b).

VICE-CHANCELLOR SIR W. PAGE WOOD, however, directed the costs of both suits to be paid out of the residuary personal estate of the testator.

(a) 2 Ph. 161.

(b) 2 Keen, 564; 4 My. & Cr. 231.

1856.

WORTHAM v. LORD DACRE

April 10th.

LORD DACRE, by deed in 1835, demised a messuage and land, of which he was seised in fee simple in possession, to *Thomas Wortham*, for the lives of himself and two other persons; and Lord Dacre, by the same deed, covenanted that, on the dropping of any of the lives, he the said Lord Dacre, his heirs or assigns, would, "at the request and at the costs and charges in all things of the said *Thomas Wortham*, his heirs or assigns," renew the lease.

Thomas Wortham subsequently died, having given and devised to the Plaintiff all his freehold and leasehold property. The Plaintiff thereupon applied for a new lease, and the deed was prepared and approved by Lord Dacre's solicitors, and engrossed, and was ready for execution when Lord Dacre died. By his will, made in 1842, Lord Dacre devised the messuage and land, subject to the lease, to trustees, charged with an annuity, and in strict settlement, under which there was no power to grant the lease, and the first person entitled to an estate of inheritance was an infant. The bill was filed to have a lease executed under the order of the Court.

The question was how the costs of the suit should be provided for.

Mr. *Southgate*, for the Plaintiff, claimed to have the costs paid out of the personal estate of the late Lord Dacre.—He cited *The Midland Counties Railway Company v. Westcomb* (a), where a person, having contracted to sell land, af-

Covenant to renew Lease—Subsequent Settlement of Covenanter's Estate—Suit—Costs.

Where a person bound by a covenant to renew a lease if required, "at the costs and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease:—

Held, that the costs of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant.

(a) 11 Sim. 57.

1856.
 WORTHAM
 v.
 LORD DACRE.
 —
Argument.

terwards died intestate, leaving an infant heir, and the costs of a suit to obtain a conveyance were ordered to be paid out of the purchase-money; *Hanson v. Lake* (a), in which, under similar circumstances, there being no default on either side, L. J. *Knight Bruce*, then Vice-Chancellor, declined to follow that case; *Midland Counties Railway Company v. Caldecott* (b); *Eastern Counties Railway Company v. Tuffnell* (c); *Hinder v. Streeten* (d), in which the vendor had devised his estate to infants, but it does not appear whether the will was made before or after the contract, the delay in completing however having been for the convenience of the purchaser, it was held that no costs should be given; and *Ex parte Barnes* (e).

Mr. *Archibald Smith*, for the Defendants, relied on the provision in the original lease, that the renewal was to be at the costs and charges in all things of the lessee; and cited *King v. Smith* (f), in which it was decided, that the costs of a petition and order under 1 Will. 4, c. 60, for the reconveyance to the mortgagor of the mortgaged estate which had been devised by the mortgagee to trustees, one of whom could not be found, must be borne by the mortgagor; and *In re Doolan* (g).

Judgment.
 —

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The real difficulty in this case is occasioned by the clashing of the decisions which have been made under like circumstances. I see a principle which I should have thought would have been sufficient to carry all these costs, namely, that the estate of a party who puts himself under an obligation, and is prevented by death or illness from performing

(a) 2 Y. & C. C. 328.

(b) 3 Railw. Cas. 394.

(c) Id. 133.

(d) 10 Hare, 18.

(e) 17 L. J., N. S., Chanc., 436

(f) 6 Hare, 473.

(g) 2 Con. & L. 232.

that obligation, should bear the expenses thereby occasioned. In a case, however, where the event is simply an act of God, as the death of the party leaving an infant heir, as in *Hanson v. Lake* (a); or in a case where the party made his will previously to the contract, and then died; in those cases, there being no act done by either party, it may be just that no costs should be given on either side.

1856.
WORTHAM
v.
LORD DACRE.
Judgment.

It seems to me, however, that there is a substantial distinction between the case of a contracting party being prevented from completing by his death, and the case of a man entering into a contract, and then deliberately placing the property in another person, who in all probability will not be able to complete the contract, as in this case, where there are limitations to unborn persons. It is the duty of a man who has entered into a contract respecting his property, to take care that it should not be put into such a position. The other party to the contract is, in all these cases, perfectly innocent.

In this case, the first point taken by Mr. *Smith* was, that there is an express contract that the renewal should be at the costs and charges in all things of the lessee; but I do not think that those words can apply to the costs of a suit to carry into effect a contract. It could not apply to the costs of a suit in which the testator, having declined to complete the contract, might be compelled to do so. Why then should it apply to a suit after the death of the contracting party, to enforce the performance of the contract: the parties have a right to bring actions at law, whilst by a suit the estate is freed from all further responsibility. Cases have arisen in lunacy on this point, and a late decision of Lord *St. Leonards'* throws a clear light on the subject. In *Ex parte Barnes* (b) Lord *Cottenham* held, that, where a lunatic was bound by such a covenant, the lunatic's estate should bear

(a) 2 Y. & C. C. C. 328.

(b) 17 L. J., N. S., Chanc., 436.

1856.
 WORTHAM
 v.
 LORD DACRE.
 —
Judgment.

the costs of applying to the Court to enable the committee to grant a renewed lease. In *Re Doolan (a)*, Lord *St. Leonards* expressed an opinion that a party interested in the lease should not apply; and intimated that the party who should have applied was the party whose estate was charged with the burden of the contract, namely, the committee of the lunatic; and the effect of his decision in that case is, that the expense of a man's putting himself in a condition to fulfil his contract must be borne by his own estate.

The case of a mortgagee is different, he is the absolute owner at law, and it is an indulgence granted by this Court to allow the mortgagor to redeem, and as a consequence of that being an indulgence, he is rendered liable to every expense necessary to the reconveyance, because the mortgagee is at liberty to deal with the estate as he pleases.

In this case, I cannot hold Lord *Dacre's* estate to have been at his free disposal; it is subject to a covenant, and is only his when that covenant is performed. Where a party knows that he is liable to a contract of this kind and knows that the estate cannot be liberated except by performance of the contract, and places the estate in such a position that it cannot be performed, it is reasonable that the covenantee should not pay the expenses occasioned by the covenantor having put the estate into that position, but that such expenses should be borne by the estate of the covenantor.

I find no case, except *Hinder v. Streeten (b)*, in which the difficulty was occasioned by an actual disposition of the property after the contract had been entered into.

The costs must be paid by the executors out of the covenantor's personal estate.

(a) 2 Con. & L. 232.

(b) 10 Harc, 18.

1855.

ANONYMOUS.

ON the 31st of May, 1855, Z., of the firm of X. & Z., ship-brokers, attempted to commit suicide by shooting himself in the head.

Messrs. X. then filed their bill against Z. to have it declared that the partnership ought, under the circumstances, to be dissolved, and praying for an injunction to restrain Z. from interfering in the affairs of the partnership. In the meantime they took such measures as prevented Z. from drawing on the partnership funds in the same manner as his copartners.

Z. thereupon filed a cross bill, for the purpose of being re-

the partnership affairs, refused, the evidence not shewing, that, at the time of the motion, he was incompetent to conduct the business of the partnership according to the partnership articles. And a motion in a cross suit, to restrain Defendants in such cross suit from preventing the partner who had been insane from transacting the business of the partnership as a partner thereof, granted.

The circumstances, that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he laboured might as easily have led him to attempt the life of one of his partners, were held not to furnish sufficient ground for granting the first motion.

Examination of the authorities on this subject. They establish these propositions:—

1st. Actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree for dissolution.

2ndly. Such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership.

Semble, the affirmative of this issue would then lie with the party who had been of unsound mind.

3rdly. Insanity existing when the relief is sought, is good ground for a dissolution.

(a) This report has been delayed from the inability of the Editors to obtain the papers required for its compilation.

At the request of one of the parties, it is now published as an anonymous case.

Dec. 17th &
18th;
1856,
Jan. 16th (a).
Partnership—
Dissolution—
Insanity—
Attempted
Suicide.

—
Motion for an
interim in-
junction to re-
strain a part-
ner, who, six
months previ-
ously, being
temporarily of
unsound mind,
had attempted
to commit
suicide, from
interfering in

1856.
ANONYMOUS.
Statement.

placed in his position as a partner, and praying for an injunction to restrain Messrs. X. from preventing him from transacting the business of the partnership, as a partner thereof.

On the 27th of July, 1855, the Court was moved for an injunction in the suit of X. v. Z.; but the motion stood over by arrangement to afford Z., whose mental condition was attributed to over-exertion in the affairs of the partnership, an opportunity for relaxation.

The motion in the suit of X. v. Z. was now renewed, and at the same time an injunction, as prayed in the cross suit of Z. v. X., was also sought by a cross motion.

From the evidence adduced on the present occasion, it appeared, that, on the 31st of May, 1855, when the suicide was attempted, and for at least a week previously, Z. was undoubtedly of unsound mind. On the other hand it appeared, that, for a period of twenty-four or twenty-five years immediately preceding the attempted suicide, Z. had applied himself, for considerably more than the usual hours of business, to the affairs of the firm, originally as a clerk and subsequently as a partner; and that, during the whole of that period, he had never, except on one occasion, allowed himself more than one day at a time for relaxation. The special circumstances under which his mind gave way are sufficiently stated in his Honor's judgment.

Dr. *Ramskill*, the physician who attended Z. professionally, and believing him to be insane on the occasion of the attempted suicide, had given strong advice after that event that he should be withdrawn from the cares of business, saw him again on his return in the autumn; and now, by his affidavit as a witness on behalf of Z., deposed, that, in his opinion, Z. had recovered, and was fit to transact business.

On cross-examination he deposed as follows:—" *Question.* Do you consider that Mr. Z. is as capable of transacting an arduous business as he was in April, 1855, before his illness?—*Answer.* I do so consider him at present. I believe that Mr. Z.'s mind is more likely to be affected by the strain of an arduous business than if it never had been affected. I think that, if a crisis in business occurred while Mr. Z.'s health was affected as it was in April, 1855, the effect on his mind would be the same. *Q.* Do you consider that his state of health, bodily and mental, is such that he is capable now of returning to fill the same place in the office for a continuance?—*A.* If the circumstances are the same, I think the result would be the same."

1856.
ANONYMOUS.
Statement.

Other medical witnesses deposed, that the same bodily and mental condition which led Z. to attempt suicide might have led to an attempt at homicide.

This was all the medical evidence of importance.

Several persons, who dealt largely with the firm in their business of shipbrokers, deposed, that if Z. remained a partner they should be disposed to—some saying that they would—withdraw their custom.

Mr. Rolt, Q. C., and Mr. Cairns, for Messrs. X., now moved for an interim injunction as prayed in the suit of X. v. Z., and opposed the motion in the cross suit.

Argument.
—

We rely not on the mere circumstance of Z.'s insanity, although that would have been a sufficient ground for the injunction, but upon this:—

First, that the effect of what has occurred has been to destroy that confidence which in every firm is the foundation

1856.
 ANONYMOUS.
 Argument.

of the partnership, and which in the present partnership,—the business of which is of such a nature as to be incapable of being transacted by clerks,—is absolutely indispensable.

Secondly, that, owing to the peculiar sensitiveness of mercantile men in the city of *London* in all matters relating to credit, the credit of the firm would be destroyed if *Z.* were allowed to continue in the partnership. In support of this presumption we have the positive evidence of several persons large customers of the firm, that if *Z.* continue a partner they will withdraw their custom. The act is a cloud upon the credit of the firm, and for that reason is a sufficient ground for a dissolution; as in the case of a partner forging a bill of exchange, where the decree is not based upon the circumstance that the act is criminal.

It is in evidence that the same bodily and mental condition which led to this act may, should it recur, lead to an attempt at homicide; and that it was a mere accident that such was not the result in this instance.

[The VICE-CHANCELLOR asked for authorities for dissolution on the ground of lunacy.]

We carefully abstain from resting our motion on the ground of lunacy. Strong authorities, however, on that subject are *Sayer v. Bennet* (a), Domat. Civ. Law, b. i. tit. 8, s. 5, art. 12, and Story on Partnership, 421.

Mr. *Willcock*, Q. C., and Mr. *Shapter*, contra, relied on the peculiar combination of extraordinary circumstances under which *Z.*'s mind had temporarily given way, and upon his subsequent restoration. It was not a case of permanent insanity. And it was clear from the authorities, that the Court

(a) 1 Cox, 107.

will not decree a dissolution unless there be evidence sufficient to satisfy a jury that the partner is permanently insane, or, at least, that his recovery is extremely improbable: *Waters v. Taylor* (a), *Wrexham v. Hudleston* (b), *Kirby v. Carr* (c), *Jones v. Noy* (d), *Sadler v. Lee* (e), *Besch v. Frolich* (f), *Leaf v. Coles* (g).

1855.
ANONYMOUS.
—
Argument.

[The VICE-CHANCELLOR.—The observations in *Wrexham v. Hudleston* must point to this, that the mere fact of insanity is not of itself a dissolution.]

Again, insanity is a word requiring definition. It means one thing in a criminal, another in a civil proceeding. In the latter, it is not merely a temporary furor produced by illness, or some other transient cause, but a permanent inability in the patient to conduct his affairs: Dr. Conolly's "Inquiry concerning the Indications of Insanity (h)," and *Bagshaw v. Parker* (i).

Mr. Cairns in reply:—

Z. contributed no capital. He was admitted as a partner solely in consideration of his skill, and that is now lost to the partnership. Again, the reputation of the firm will suffer if he continues a partner.

[The VICE-CHANCELLOR.—Many cases may be conceived in which a partnership would sustain loss by reason of the misconduct of a partner. Immoral conduct, for instance, on the part of a partner might occasion loss to the firm, but

(a) 2 Ves. & B. 299.

(b) 1 Swanst. 514, n., 516, 517.

(c) 3 Y. & C., Exch., 184.

(d) 2 My. & K. 125.

(e) 6 Beav. 324.

(f) 1 Ph. 172.

(g) 1 De G., M'N. & G. 171, 174.

(h) Pp 300, 304, and 319 to 322.

They cited also, pp. 242, 248, 253.

(i) 10 Beav. 532.

1855.
 ANONYMOUS.
 —
Argument.

would not necessarily be held in this Court a sufficient ground for decreeing a dissolution.]

It was decided, in the case of a partnership between accoucheurs, that immoral conduct of one partner was alone a ground for dissolution.

[The VICE-CHANCELLOR.—In such a case, immoral conduct would materially affect the particular business of the firm.]

The Court does not concern itself with the question, what is immorality? but simply with the consequences of the act.

No case cited, or hitherto determined, has involved the ingredient of an attempt at suicide. In this respect the present is *res integra*.

Judgment reserved.

1856.
 Jan. 16th.
 —
Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The jurisdiction which I am called upon to exercise in this case is, according to Lord *Eldon*, following an observation of Lord *Thurlow*, "most difficult and delicate, and to be exercised with great caution" (a).

Before considering the exact circumstances of the case, I think it right to state what seems to me to be now the settled law: because there have been some propositions of an extreme character contended for on the part of the Plaintiffs in the suit of *X. v. Z.*

I apprehend it is quite settled, that the actual insanity of

(a) *Waters v. Taylor*, 2 V. & B. 304.

a partner is not of itself a dissolution of the partnership. It is necessary to obtain a decree for dissolution, and the dissolution does not take place until the decree has been made.

1856.
 ANONYMOUS.
 ———
Judgment.

In the next place, I think the law is now settled as it was laid down by Lord *Kenyon* in *Sayer v. Bennet* (a). The case itself does not appear to have proceeded to its full consequences; but I look on Lord *Kenyon's* judgment as settling the law at the present moment. It is recognised as law by Lord *Eldon* in *Waters v. Taylor* (b), and I apprehend I cannot do better than state the view of the law entertained by Lord *Kenyon* in *Sayer v. Bennet*. It is reported in *Cox's Reports*, but I shall cite it from a note of Mr. *Montagu's* (c), which I observe corresponds with the report in *Cox* nearly verbatim. In that case there had been decided insanity, through which the partner in question had been compelled to be put under restraint, and Lord *Kenyon* thus expressed his view of the case. He said, "I will venture to lay down as a general rule, that, where there are two partners, both of whom are to contribute their skill and industry in carrying on the trade, the insanity of one of them, by which he is rendered incapable to contribute that skill and industry on his part, is a good ground to put an end to the partnership, not by the authority of either of the partners, but by application to a Court of justice, and this for the sake of the partner who is rendered incapable, as well as of the other, for it would be a great hardship upon a person so disordered, if his property might be continued in a business which he could not control or inspect, and be subject to the imprudence of another. If this, then, were the case of one of the partners being insane at the present moment, I should not have a particle of doubt to decree the dissolution of the partnership, and to make a precedent, for I confess I have not been able to find any."

(a) 1 Cox, 107.

(b) 2 V. & B. 302, 303.

(c) *Montagu's "Digest of the Law of Partnership,"* Note (c).

1856.
 ANONYMOUS.
 Judgment.

It is scarcely necessary for me to notice the very slight vestiges of authority that there were before *Sayer v. Bennet*, because that case puts the law of the Court entirely on its proper footing. One or two cases were referred to in the discussion in that case, particularly *Pearce v. Chamberlain* (a), in which *Wrexham v. Hudleston* was noticed by the Master of the Rolls in his judgment. The latter does not appear to have any very material bearing on this case as it now stands; for the Master of the Rolls said it was a case of dejection, of temporary disorder, which he did not think would deprive the partner of the right to go on with his business. It may have some bearing on this case; but from the Master of the Rolls saying, that the other partners could not put all into their own pockets without accounting for it, I should think there had been an attempt on the part of the others to carry on the partnership with the whole capital of the partnership, excluding this party.

Then, what is to be done in a case where there has been clear undisputed insanity anterior to the application to the Court, but a doubt arises as to what is the state of mind of the party at the time the cause comes on to be disposed of. There again I have the authority of Lord *Kenyon* for saying, that, in such a case, the inquiry is not an ordinary inquiry, such as is directed on a commission of lunacy, whether the person is capable of managing himself and his affairs, but is a specific inquiry directed to the specific subject-matter in dispute between the parties; for the inquiry directed by Lord *Kenyon* in *Sayer v. Bennet* was, "whether the Defendant be in such a state of mind as to be able to conduct the business in partnership with the Plaintiff according to the articles of partnership," following entirely the law which he had himself laid down, and pointing the inquiry as to whether or not the partner

(a) 2 Ves. 33.

was in a state of mind capable of fulfilling this specific engagement which he had entered into. As far as the result in *Sayer v. Bennet* is noticed, it appears that the inquiry was not satisfactory to Lord *Kenyon*, and he directed an issue in the same terms. The result of that issue is unknown.

1856.
ANONYMOUS.
Judgment.

Whether the suit of *Sayer v. Bennet* was compromised, or the issue waived, does not appear. It appears, however that the principles there laid down by the Court, and which seem to have been recognised by Lord *Eldon* in *Waters v. Taylor*, were these, namely, that there must be a decree of the Court before the partnership can be dissolved; but that such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made where there is any dispute on the subject, without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership. The affirmative of the issue, I apprehend, would in that case lie with the party who had been of unsound mind, who would have to shew that he was so far restored as to be able to conduct the business.

I have observed that *Sayer v. Bennet* seems to me the most important case on the point, and I will now notice the observations of Lord *Eldon* upon that case in *Waters v. Taylor* (a). He says, "The question whether lunacy is to be considered a dissolution, is not before me. It was not in that case," (meaning *Sayer v. Bennet*). "I shall therefore say no more upon it than this: If a case had arisen in which it was clearly established, as far as human testimony can establish, that the party was what is called an incurable lunatic,

(a) 2 V. & B. 303.

1856.
 ANONYMOUS.
 Judgment.

and he had by the articles contracted to be always actively engaged in the partnership, and it was therefore as clear as human testimony can make it, that he could not perform his contract, there could be no damages for the breach in consequence of the act of God: but it would be very difficult for a Court of equity to hold one man to his contract, when it was perfectly clear that the other could not execute his part of it. It will be quite time enough to determine that case when it shall arise; for, as we know that no lunacy can be pronounced incurable, yet the duration of the disorder may be long or short; and the degree may admit of great variety. I would not, therefore, lay down any general rule by anticipation, speculating upon such circumstances. I agree with Lord *Thurlow*, that the jurisdiction is most difficult and delicate, and to be exercised with great caution."

In a recent case in the Court of Exchequer, Lord *Abinger* appears to have been at first surprised (probably from not having been so well versed in the course of the Courts of equity as he was able and distinguished in that of the Courts of common law) that the dissolution should be effected at all in the case of lunacy. It is the case of *Kirby v. Carr* (a). The Chief Baron at first expressed doubts as to the jurisdiction of the Court, but he was soon satisfied on that point. In *Kirby v. Carr*, the Defendant became a lunatic in 1834; the bill was filed in August, 1837. The evidence for the Plaintiff was, that, since July, 1834, (which was when the Defendant became a lunatic) he had never attended the office, or taken any part in the business of the partnership; that, in 1834 and 1835, he was for some months in a lunatic asylum, where he had made several attempts to destroy himself, and had refused to engage in the employments provided for the patients; and further, that,

(a) 3 Y. & C., Exch., 184.

for fourteen months previous to April, 1838, he had likewise been in a lunatic asylum. Two medical men who were examined, gave it as their opinion that he was decidedly insane, and that the malady was likely to be permanent. There was, however, a chasm in the evidence of insanity during the latter part of the year 1835 and the year 1836; and the surgeon who was examined as to the party's insanity during the fourteen months previous to April, 1838, could not depose as to two months of that time during which the Defendant was under the care of another surgeon. The Chief Baron, nevertheless, (it appears to have been a case of a very strong character), said, " My opinion is, that the evidence in this case is not such as would satisfy a jury of the Defendant's permanent insanity; but, on the authority of Lord *Kenyon* in *Sayer v. Bennet*, I shall direct an inquiry." And he did direct an inquiry similar to that in *Sayer v. Bennet*.

1856.
 ANONYMOUS.
 Judgment.

I have thus noticed the law, as it appears to me to be entirely settled by the cases to which I have referred, because some propositions were advanced on behalf of the Messrs. X. which seem to me a great deal beyond what the authorities warrant. When the motion was first made in July last, it was contended, and I think the argument is put almost as high now, that, to whatever state of mind Mr. Z. might attain by means of relaxation, nothing could satisfy the Messrs. X.; their confidence was lost, they could no longer think, whatever others might think, that there was any possibility of the business being ever carried on in a satisfactory manner; and therefore, that they, having entered into this partnership on the ground of mutual confidence, mutual help, and mutual assistance, to be derived by the partners from each other—would be entitled, whatever might be the result of the relaxation afforded to Z., or whatever might be the opinion of others after that relaxation had been enjoyed, to a decree for a dissolution of the partnership. I apprehend

1856.
ANONYMOUS.
—
Judgment.

it to be clear on the authorities to which I have referred, that this would not be the position in which Messrs. X. would stand. They would be compelled to submit, by means either of an inquiry or an issue, to an investigation upon evidence; and if that evidence should satisfy either the Court, or the jury before whom the case might be laid, as to their partner's recovery, I apprehend that the Messrs. X. must be bound by it. Of course they would be bound by the decision of the Court, but I apprehend they would be bound by the verdict of a jury; that, if a jury should be satisfied that there was reasonable ground for supposing that Mr. Z. was so far recovered as to be able to carry on the business, the Messrs. X. must be satisfied also, and the business must be conducted by them as before, in partnership and in concurrence with Mr. Z.

Another point was raised, which also seems to me quite beyond any of the authorities. It was said, that the result of this act which Mr. Z. has committed, is one which has shaken the confidence of all the customers—he has attempted suicide. That circumstance of itself, unexplained, is doubtless a very disastrous thing to any house of business. Persons to whom it is not easy to explain all the circumstances of the transaction—persons at a distance—creditors of the concern—might well suppose that the concern itself was in a state of difficulty and embarrassment. It might occasion an unusual, hasty demand on the assets of the house, and besides that, it might shake the confidence of future customers, and tend to discourage them from employing the house; and a great deal of evidence has been produced on the part of customers of considerable importance, who deal largely with the house in their business of shipbrokers, to the effect, that if Mr. Z. remain a partner they should be disposed to (some say they will) withdraw their custom; and this evidence is not met by counter evidence. But I apprehend that is not enough. It is not on the opinions which

customers, or any other persons, may form as to what may probably be the result. The case must rest on the opinion which the Court, or possibly a jury, may form as to the state of mind of the party, and as to his fitness to carry on the business. That was the course taken as well by Lord *Abinger* in *Kirby v. Carr* (where the circumstances were extremely strong), as by Lord *Kenyon* in that case, which I think has laid down all the principles that govern these cases, namely, *Sayer v. Bennet*. Therefore, I apprehend, that, whatever may be the result, if Mr. Z. be found hereafter by a jury to be in a state competent to conduct the affairs of this business according to the articles of partnership, although all the customers chose to come forward and depose that they should withdraw their custom, there could be no decree for a dissolution. The circumstance of the creditors so deposing would of course be evidence for the jury to consider. But if the jury, on medical and other testimony, come to the conclusion that Mr. Z. was in such a state of mind as to be able to conduct the business in partnership with the Messrs. X. according to the articles of partnership, he would be entitled to all the rights and privileges of a partner.

1856.
ANONYMOUS.
Judgment.

The real question, therefore, comes to this—how far at this time, assuming this to be the hearing of the cause, I am satisfied that Mr. Z. is not (to use the words employed in the reference directed by Lord *Kenyon*) in such a state of mind as to be able to conduct the business of the partnership with his copartners, according to the articles of partnership.

This question, which in all cases is, as Lord *Eldon* expresses it, one of extreme delicacy and difficulty, is in the present case attended with peculiar circumstances of delicacy and difficulty.

[The VICE-CHANCELLOR then went into the evidence, and

1856.
ANONYMOUS.
Judgment.

first into that portion of the evidence which related to Mr. Z.'s state of mind when he attempted suicide: from which his Honor concluded, that there was not the slightest doubt that the act was as deliberate as such an act can ever be said to be; and that, at the time when it was committed, and for a week or two previously, Mr. Z. was undoubtedly of unsound mind. Had the Court felt it right to come to an immediate conclusion upon the case in July last, its conclusion, upon the evidence as it was then presented, would have been that Mr. Z. ought to be restrained from interfering in the partnership affairs. An arrangement, however, had then been very properly entered into, that the cause should stand over until Mr. Z. had had some further relaxation, and the effect of that relaxation should be known to the Court, when it would be in a better position to see how far that which had been the normal condition of Mr. Z.'s mind up to May, 1855, had been restored. Mr. Z. had now had the benefit of relaxation during the whole of the time that had intervened. The result appeared to be most favourable, and, upon the evidence as it now stood, the Court was not in a position to say that Mr. Z. was unable to conduct the business of the partnership according to the partnership articles.]

In reference to this, which is the real question between the parties, the most important evidence was that of Dr. *Ramskill*, the latter part of which occasioned me for a time a degree of doubt, which, however, upon a very anxious consideration of the case, ought not, in my opinion, to lead to a conclusion that Mr. Z. is unable to conduct the business according to the articles of partnership.

To estimate aright the effect of Dr. *Ramskill's* evidence, it is necessary to consider how this unfortunate state of mind was produced. Had it been produced in the ordinary transactions of business, the latter part of Dr. *Ramskill's* evidence on cross-examination would have amounted to an opinion, on

his part, that Mr. Z. was not able to attend to the ordinary business of the partnership. But it was not the ordinary transaction of business which overthrew Z.'s mind. The case stood thus: In the year 1854 he was subjected to a very unusual number of distressing events. In July in that year, he lost a relative. Two sisters, who were residing with him, became seriously ill; and in September, he lost his mother. He soon afterwards received intelligence of the death of a brother. And, in this state of circumstances, business of a harassing description occurred to distress his mind. What such business was, except the loss of a ship belonging to a company of which he was a director, does not precisely appear. All business requiring much time and thought, becomes business of a harassing description; and, under ordinary circumstances, such business would not be sufficient to account for an overthrow of the mind; but when it supervened on domestic calamities such as had here occurred, it is not surprising that a mind, which for twenty-four or twenty-five years had had scarcely any relaxation, should have given way.

1856.
ANONYMOUS.
Judgment.

Such being the state of circumstances under which Mr. Z.'s mind gave way—a state of circumstances which certainly cannot be considered as the ordinary normal state of circumstances in which he is placed in carrying on the business of the firm—what Dr. *Ramskill's* evidence amounts to is this: not that, if Mr. Z. is subjected to the ordinary transaction of business, including crises, (to which of course, in the ordinary transaction of such business, he must be exposed), he might become insane; but that, should a crisis occur while his health is affected as it was in April, 1855, he would again become insane. But why am I to assume that there will be that combination of circumstances? that his health is not to be cared for, that he will not have regard to his health, that his brother and his partners will not have regard to his health? It is in evidence that his health was considerably affected. It is in evidence that that affection de-

1856.
 ANONYMOUS.
 Judgment.

pended on circumstances which cannot occur again, the loss of a mother, and the loss of other relatives—that was the great cause of his state of health;—and all that Dr. *Ramskill* says is, in effect, this:—‘It is impossible for any human judgment to pronounce with certainty in this case; but the result of my opinion is, that he is at this moment quite fit to transact any business, however arduous, of the firm. My opinion is, that his mind is more likely to give way than if it had never given way at all; and I therefore think, that, if in that arduous business of which you speak, anything in the shape of a crisis,—anything in the nature of extraordinary emergency shall occur, and there shall be coupled with that the state of health that existed in February, 1855, then, and not till then, the result will be unfavourable.’ After a very anxious consideration of the case, it does not appear to me that Dr. *Ramskill’s* positive evidence in chief as to Mr. *Z.’s* fitness can be shaken beyond this.

Up to this time I have been considering the case as if it were the hearing of the cause; but when I consider, that, according to the authorities, no dissolution of the partnership has yet taken place, or can take place until the decree,—for, in these cases, it is only at the decree that the dissolution takes place,—and when I consider that it is not at all improbable that, if this were the hearing of the cause, I should not feel satisfied that such a case had been made as would entitle the Messrs. *X.* to a decree, (certainly, looking at the case before Lord *Abinger*, I have a far weaker case to deal with here), and that it might be necessary to direct some inquiry, either taking the inquiry myself at Chambers, or directing an issue; I apprehend the more prudent course in every respect, and one which is more likely to lead to a just solution of the matter when it comes to a hearing, is to re-instate Mr. *Z.* in his position of a partner—to enable him to resume his duties, and then, if disastrous results should ensue, those results will be tested, and the Court will have

them before it as additional facts, in determining what decree it may be proper to make at the final hearing of the cause.

1856.
ANONYMOUS.
Judgment.

I have not forgotten, of course, the argument which was a good deal pressed upon me, as to the position in which the case would have stood if Mr. Z., instead of attempting suicide, had attempted homicide, to which some of the medical witnesses say the termination of the disorder might lead. Suppose he had done so; and suppose he had even attempted the life of one of his partners. It would be a question whether a partner would be obliged to sit in the same room, at the same table, with one who had attempted his life. But, I apprehend, that, even in such a case, the course to be adopted would be the same, the whole evidence would have to be investigated. The question would be, 'Is this a state of mind in which this gentleman is at this moment placed? (if so, then *cadit quæstio*); or is it a state in which, looking at all the evidence, one can come to a reasonable conclusion, that the probabilities are, he will again be placed, in consequence of again attempting to transact business?' The difficulty would have to be met in that way. And even if this were a case in which the homicide of one of the partners had been attempted I should feel unable (for the reasons I have already alleged in treating it as a case of suicide only) to come to the conclusion, that, in Mr. Z.'s present state of mind, it would be right to remove him from the partnership.

I am obliged to come to the conclusion, at this stage of the case,—and I think it would be the same if it were at the hearing (if this were the hearing I should direct an inquiry)—that I am not in a position to remove Mr. Z. from the business.

I must refuse the motion in the suit of *X. v. Z.* I must grant the motion in the cross suit of *Z. v. X.*

1856.
 ANONYMOUS.
 —
Judgment.

An order being made in *Z. v. X.*, of course those costs will be costs in the cause. In *X. v. Z.*, I think the costs of the motion must be reserved till the hearing; but if the cause should not reach a hearing, I direct them to be costs in the cause.

Mr. Rolfe.—Your Honor does not direct any inquiry or any issue now.

The VICE-CHANCELLOR.—I do not.

Mr. Rolfe.—Of course the Court can do so.

The VICE-CHANCELLOR.—I purposely abstain from doing so, because I am rather anxious that the experiment should be tried.

[The costs in *X. v. Z.* were reserved generally.]



March 3rd.

HIND v. WHITMORE.

Married Woman—Next Friend—Security for Costs.

A married woman may sue alone in forma pauperis, but if she sues by a next friend, he must be a substantial person, and capable of answering the costs of the suit. If not, the Defendants may obtain an order to stay proceedings in the suit until the Plaintiff appoints some substantial person her next friend.

THE bill in this suit was filed by a married woman, suing by her next friend, who was a poor man. The Plaintiff, some time since, had filed a bill for the same purpose by a next friend, who had since died a pauper in a workhouse, and an order had been made in that suit to dismiss the bill, with costs, for want of prosecution; but the next friend had died before that order was made, and, consequently, such costs were still unpaid.

The same rule does not hold in an infant's suit, because an infant does not choose his own next friend, and also because the Court readily entertains a suit on behalf of an infant, and will, of its own accord, stay the proceedings in such a suit if not for the infant's benefit.

Where the costs of a former suit for the same purpose, which had been ordered to be dismissed for want of prosecution, were unpaid, the next friend in that suit having died insolvent:—*Held*, that the Court could not stay proceedings in the new suit until those costs were paid.

If no direction is given by the Court concerning the costs of a motion, they are costs in the cause.

This was a motion by some of the Defendants to stay proceedings until a substantial person should be appointed next friend of the Plaintiff, and until the costs of the former suit should be paid.

1856.
HIND
v.
WHITMORE.
Statement.

Mr. Willcock, Q. C., for the motion, relied on *Pennington v. Alvin* (a), *Wilton v. Hill* (b), and *Drinan v. Mannix* (c), as to the first part of it; and with respect to the second part of the motion, he cited *Spires v. Sewell* (d), *Long v. Storie* (e), and *Altree v. Hordern* (f).

Argument.

Mr. Rolt, Q. C., and Mr. Hensman, for another Defendant, who had made a similar motion.

Mr. Pearson, contra, relied on *Squirrel v. Squirrel* (g); on the report of *Drinan v. Mannix* (h), *Dowden v. Hook* (i), *Jones v. Fawcett* (k), *Stevens v. Williams* (l), *Ogilvie v. Hearne* (m), and *Corbett v. Corbett* (n). A married woman may now sue in formâ pauperis without a next friend, and upon application ex parte may obtain an order for that purpose: *In re Lancaster* (o).

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think, if I had to rely only on the particular circumstances of this case, there is enough to justify my decision; but I would rather decide the case upon the broader ground, and follow the authority of Sir J. Leach in *Pennington v. Alvin* (p), which has been confirmed by Lord St. Leo-

Judgment.

- | | |
|--------------------------------|-----------------------|
| (a) 1 S. & S. 264. | (h) 2 Con. & L. 87. |
| (b) 2 De G., M'N. & G. 807. | (i) 8 Beav. 399. |
| (c) 3 Dru. & W. 154. | (k) 2 Ph. 278. |
| (d) 5 Sim. 193. | (l) 1 Sim. N. S. 545. |
| (e) 13 Jur. 1091. | (m) 11 Ves. 598. |
| (f) 5 Beav. 623. | (n) 16 Ves. 407. |
| (g) 2 P. Wms. 297, n.; 2 Dick. | (o) 18 Jur. 229. |
| 765; 1 Ves. jun. 409. | (p) 1 S. & S. 264. |

1856.
 {
 HIND
 v.
 WHITMORE.
 —
 Judgment.

nards and the present Lord Chancellor. I find, in this case, that the parties have been harassed in a former suit by this Plaintiff suing by a person as a next friend, who afterwards died a pauper in a workhouse. Her prosecuting that suit, under such circumstances, seems to me sufficient, if any special circumstances were necessary, to authorise me to grant this motion.

But, in *Pennington v. Alvin* (a), Sir John Leach, though he remarked that it was a gross case, rested his decision simply on the ground, that the case of a married woman presented circumstances very different to that of an infant, and that her next friend should be a person of substance. That decision was followed in *Drinan v. Mannix* (b) by Lord St. Leonards, in a case where there was fraud on the part of the married woman, in suing without her husband. And I find that the present Lord Chancellor, in *Stevens v. Williams* (c), adopted those decisions, without relying on any special circumstances.

On the other hand, there is the authority of Lord Langdale in the case of *Dowden v. Hook* (d), passing by *Squirrel v. Squirrel* (e), because, in that case, though it turns out to have been a case in which a married woman was concerned, no distinction was taken between the cases of married women and infants, and that was so held in old cases in *Atkyns* and *Moseley*. I do not find that Lord Thurlow's attention was directed, in *Squirrel v. Squirrel* (e), to the distinction between the cases of a feme coverte and an infant. I therefore prefer to follow the later authorities which I have mentioned. I have found a report of the decision of the Lord Justice Knight Bruce, then Vice-Chancellor, in *Jones v. Fawcett* (f),

(a) 1 S. & S. 264.

(b) 3 Dru. & W. 154.

(c) 1 Sim. N. S. 545.

(d) 8 Beav. 399.

(e) 1 Ves. jun. 409; 2 P. Wms. 297, n.

(f) 11 Jur. 529.

and he is there made to say, after having heard the case of *Dowden v. Hook* (a), "Suppose a married woman has a clear right, and cannot obtain any person to be her next friend, what is she to do? I have been much struck by those observations of Lord *Langdale*. In this case, there is an adjudication that the woman is at least entitled to an inquiry." That was because a decree for inquiry as to the Plaintiff's claim had previously been made. He therefore directed security to be given for the costs incurred, which would be a matter of course; but he would not inquire as to the solvency of the next friend, with a view to security for the future costs. Lord *Cottenham*, on appeal, reversed that decision, but declined to give his opinion on the point of discrepancy between the authorities, saying only that the Defendant had a right to object to the substitution of a new next friend for the existing next friend. Therefore, there is a decision of Lord *Langdale*, and the view taken by the Lord Justice *Knight Bruce*, in opposition to the other authorities on this subject. But the recent decision, that a married woman may sue in formâ pauperis without a next friend, introduces a new consideration. In *Dowden v. Hook* (a) Lord *Langdale* remarked, that, by the practice of the Court as it then existed, a married woman suing by her next friend had been admitted to sue in formâ pauperis; and said, that it was therefore too much to contend that the next friend must necessarily, in all cases, be a person able to answer any claim against him for costs.

1856.
HIND
v.
WHITMORE.
Judgment.

The circumstances which make a difference between the case of a feme covert and an infant are, not only that a feme covert selects her own next friend, but also that this Court is always anxious that cases in which infants are concerned should be brought to its notice, and it has a jurisdiction over suits by infants, which it has not in the case of suits by

(a) 8 Beav. 309.

1856.
 HIND
 v.
 WHITMORE.
 —
Judgment.

married women, to stay such suits if not for the infants' benefit, and can for that purpose avail itself of any impropriety on the part of the next friend in bringing the suit. But it is not so in the case of a married woman. Her suit must go on however impossible it may be for the Defendant to have any remedy for costs, in case they should be ordered to be paid to him.

It has been urged, why should the rule be different from that which prevails in the case of a Plaintiff who is *sui juris*, who is never called upon to give security for costs on account of his poverty. But the answer is, that, in such a case, the Defendant has at least the security of the Plaintiff's person, for the Plaintiff may be attached and imprisoned if he does not pay costs when ordered to do so. That cannot be done in the case of a *feme covert*; and the consequence is, that if a *feme covert*, who has the power of selecting her next friend, is allowed to sue by a next friend, who is not a person of substance, the Defendant may be harassed by an improper suit, without the power of staying it, as in the case where an infant is Plaintiff, or of availing himself of the remedy to recover his costs by attachment and imprisonment of the person of the Plaintiff, as where the Plaintiff is *sui juris*. Now that it has been decided that a married woman may sue alone in *formâ pauperis*, there is very little inconvenience, for, if she has no property under her own control, and is unable to procure a next friend, she can sue in *formâ pauperis*; and if she has separate property to the amount of 100*l.* she will be able to get some one to act as her next friend, or, upon giving security, she may make a special application to which the Court would be willing to listen, and the only possible case of grievance would be that of a married woman who possessed property of a value something between 5*l.* and 100*l.*, and who could not find any one to act as her next friend. On the other hand, there is the greater grievance of the possibility of persons being harassed improperly by the suit of a married wo-

man suing by a pauper next friend: and, balancing these inconveniences, I accede to the decision of Sir *John Leach* on this subject, followed by Lord *St. Leonards* and Lord *Cranworth*, and shall make an order on this motion to stay proceedings, in the form used in *Wilton v. Hill* (a), and *Stevens v. Williams* (b), until further order.

1856.
HIND
v.
WHITMORE.
Judgment.

As to the other part of the motion, I find no case which has gone so far, and I therefore cannot grant that part of the motion.

The order need not mention the costs of this motion; and the costs of the successful party will be costs in the cause.

(a) 2 De G., M'N. & G. 807.

(b) 1 Sim. N. S. 545.

WILLIAMS v. SALMOND.

THE bill was filed by *John Williams* on behalf of himself and all other the holders of scrip and shares in an abortive company called the *Boston, Newark, and Sheffield Railway Company*, except such of the Defendants as were holders of

VICK-CHAN.
WOOD:
1855,
Nov. 7th, 8th,
9th, & 14th.
LORDS JUSTICES:
1856,
Feb. 21st &
22nd (a).
Pleading—
Parties—Bill
by one on be-
half of several.

Liberty to sue on behalf of oneself and other persons who are too numerous to be brought upon the record, is dependent neither upon the discretion of the Court, nor upon the disposition of such other persons to concur in the suit.

But if such other persons have an interest which might be affected in case the suit were allowed to proceed as on their behalf at the instance of the Plaintiff, or if full justice cannot be done to the Defendants without having all such persons personally upon the record, the Court will not allow the suit to proceed.

Bill by a single shareholder in an abortive company against the provisional directors, praying the common account. Such directors, being entitled under the deed of settlement to full indemnity out of the deposits in respect of all costs, charges, and expenses incident to the undertaking, had returned to all the shareholders pro rata a part of such deposits:—*Held*, that, since the result of re-opening the whole of the accounts as prayed might be to shew that the persons on whose behalf the bill was filed had received more than the amount to which they were entitled, none of such persons could take the account without incurring the liability of refunding to recoup the Defendants; for which purpose the Defendants were entitled to insist on having all such persons substantially upon the record; and on this ground, as well as on the merits, the bill was dismissed.

(a) Report delayed for want of papers.

1855.
 WILLIAMS
 v.
 SALMOND.

Statement.

scrip and shares therein, against the persons who, by the subscribers' agreement, were appointed provisional directors to conduct the company's affairs.

The subscribers' agreement provided, inter alia, that a deposit of 2*l.* 12*s.* 6*d.* per share should be paid by each subscriber on the number of shares subscribed for by him at the time of or previously to signing the agreement. And further, that, whether any Act should be obtained or not, each of the subscribers should, out of the moneys which should be paid up by him by way of deposit, bear, pay, allow, and discharge, and indemnify the said directors from the expenses then already incurred, or thereafter to be incurred, relative to the surveys and estimates for the said railway and other works, solicitors' and counsel's fees, travelling expenses, and all witnesses, and other costs and charges of every description incident to the proposed undertaking, and to the applications to Parliament: such expenses, costs, and charges to be computed and assessed rateably upon the amount of the shares or sums taken and subscribed by each of the subscribers respectively.

The shares were allotted, and the deposits paid. The Plaintiff was a holder of 100 shares.

The company having failed, the provisional directors returned, out of the moneys in their hands, to all the shareholders, first, an instalment at the rate of 1*l.* per share, and next an instalment of 12*s.* 6*d.* per share. Subsequently they proposed to return to all the shareholders, out of the same moneys, a final instalment of 1*s.* 6*d.* per share. The majority of the shareholders accepted this final instalment, and released the Defendants. The Plaintiff and other shareholders refused to accept the final instalment.

The bill was for the common account of receipts and disbursements, and the usual relief consequent thereon.

1855.
 WILLIAMS
 v.
 SALMOND.
 Argument.

Mr. Daniel, Q. C., Mr. Renshaw, and Mr. Cairns, for the Plaintiff:—

The position of the Plaintiff and Defendants is that of cestui que trust and trustee; a decree therefore for the account as prayed is of course; and the Defendants, who, being mere trustees, have without reason disputed the right of their cestui que trust to an account, must pay the costs of the suit up to the hearing.

Any technical objection which may be raised on the ground of misjoinder, is removed by the late Act, 15 & 16 Vict. c. 86, s. 49, by which "the law of this Court as to misjoinder is now entirely altered:" *Clements v. Bowes* (a). That case shews, that the new doctrine is not left to the discretion of the Court; that it is imperative on the Court to follow it; and that if the Act applies to cases where the parties are named on the record, it will apply equally to cases where a Plaintiff sues, as here, on behalf of himself and all other shareholders. There, as here, some of the absent shareholders, on whose behalf the bill was filed, had an interest adverse to the Plaintiff, to maintain the propriety of a repayment, which, in the event of the account being taken, they would have, in whole or in part, to refund; but the objection of misjoinder was overruled.

[They cited also *Sturge v. The Eastern Union Railway Company* (b), and *In re Stephen* (c).]

(a) 1 Drew. 684, 694.

(b) 1 Jur. N. S. 713.

(c) 2 Ph. 562, 574.

1855.
 WILLIAMS
 v.
 SALMOND.
 Argument.

Mr. Rolt, Q. C., and Mr. Selwyn, for the principal Defendants:—

Independently of the merits, upon which alone the bill would be dismissed, the Plaintiff ought not to be allowed to proceed with a suit thus instituted on behalf of himself and all other shareholders of this company. Permission so to institute a suit is a relaxation of the rule, and a relaxation which it is in the discretion of the Court to permit or to prohibit; and where, as here, it is not for the benefit of the absent shareholders that the suit should proceed, the Court, in the exercise of that discretion, will refuse to relax the rule: *Evans v. Stokes* (a). Here, all such of the absent shareholders as accepted the final dividend have a direct interest adverse to that of the Plaintiff, since, if the account is taken as prayed, they may be called upon to refund. As in the case of the official manager of the *Grand Trunk Railway Company v. Brodie* (b), each of such shareholders must have a right to elect whether he will abide by the transaction, and retain the moneys which he has received, or impeach it, and refund those moneys; and what right has the Plaintiff to make this election for others? This argument indeed applies to all the absent parties, on whose behalf the bill was filed. And even if all such parties considered it for their interest that the suit should proceed, still, to do justice between them and the Defendants, the Court must have some means of binding the absent parties to refund, if, in taking the account, it should appear that they have received more than the amount to which they are entitled. This, and not misjoinder, is our objection to the present suit. Viewed in this light, the case is entirely distinguishable from that of *Sturge v. The Eastern Union Railway Company*.

[They also disputed the Plaintiff's title upon the merits.]

(a) 1 Keen, 24.

(b) 9 Hare, 823, 829.

Mr. *Baggallay*, Mr. *Cotton*, and Mr. *C. Roupell* appeared for others of the directors.

Mr. *Daniel*, Q. C., in reply:—

As regards the shareholders who accepted the final instalment, the directors have become the purchasers of their interest, and in fact stand precisely in their place. All such shareholders are, therefore, disposed of, and have no interest either way in the suit. And as regards those who, like the Plaintiff, refused to accept that instalment, (and as many as 7000 shares are outstanding in shareholders of this class), their position is precisely that of the absent shareholders in *Clements v. Bowes* (a).

[He also replied upon the case made by the Defendants on the merits.]

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Considering the small amount of the Plaintiff's interest in this suit, it is certainly matter for great regret that he should have thought it necessary to institute it. The utmost which, under any possible circumstances, could be coming to the Plaintiff over and above the amount of the third instalment of 1s. 6d. a share, which the Defendants offered to return to him in common with all the other shareholders, would not exceed a sum of about 54*l.* 10s.—an amount so small as certainly to try to the utmost the question, whether he is entitled to a decree. Nevertheless, the question must be considered in the same manner as it would be if the Plaintiff's interest in the suit were to a much greater amount.

(a) 1 Drew. 684.

1855.
WILLIAMS
v.
SALMOND.
Argument.

Nov. 14th.
Judgment.

1855.
WILLIAMS
v
SALMOND.
—
Judgment.

The Plaintiff's right to an account was disputed upon one ground which cannot, in my judgment, be sustained.

It was argued, that, permitting an individual to sue on behalf of himself and a large number of others, is of itself a matter in the discretion of the Court; that the Court may grant, or may withhold, such permission; that, in a suit of this nature, if the ends of justice required it, the Court would allow the suit to be thus framed, since, otherwise, by reason of the number of persons who must be made parties, no relief could be afforded; but if the ends of justice did not require it, then, being an indulgence and contrary to the usual practice, the Court, in the exercise of its discretion, would refuse its permission; and consequently, that, in a case circumstanced like the present, the Court would not allow a suit so framed to proceed.

Now, as far as this argument asserts that the question is a mere matter of discretion with the Court, I think the reply was satisfactory, viz. that if a person, having in common with others a right to an account or any other relief, chooses to assert that right, and can shew that the only difficulty in his way in asserting it is, that the persons having an identical interest with himself are too numerous to admit of their being brought on the record, then, notwithstanding such persons may not choose to assert that right which they have in common with him, provided their interest is in no way liable to be affected by the assertion of such right on his part, he ought not to be deprived of his right to sue upon any assumed discretion on the part of the Court as to the suit being frivolous or vexatious. However frivolous and vexatious the suit may appear to the Court, if the Plaintiff would have had a right to the relief prayed in case he had been the only person entitled to claim it, and if the interest of other persons entitled in common with him to claim such relief, and who are too numerous to be brought

upon the record, is in no way liable to be affected by him in the suit he has instituted in their names, the Court will not deprive him of that right merely because such other persons do not choose to concur with him in the suit. In fact, the case is analogous to that of directors of a railway company introducing some new element which the majority of the shareholders consider to be for their benefit, as, for instance, the introduction of steamboats and the like, to bring passengers to the railway,—a proceeding which, being dehors the powers of the directors, may be stopped by any shareholder filing a bill on behalf of himself and other shareholders, although every shareholder except himself should consider it more beneficial and profitable for the new scheme to be carried into effect. The law presumes that every shareholder has an interest in seeing that what is done is right and proper in point of law, whatever may be his own view as to the benefit to be derived from a departure from the strict letter of the law.

But then (and this is the serious question in the present case) I apprehend it is no less clear, that, if the Court can see that the interest of the absent shareholders may be not simply an interest leading them to say they dislike the course the Plaintiff is taking in their names, and should prefer matters remaining as they are, but an interest which would be actually affected in the event of the suit being allowed to proceed as on their behalf at the instance of the Plaintiff,—or (which is another form of the objection but in substance the same) if the Court sees that full justice cannot be done *to the Defendants* without having all such absent shareholders substantially before it, personally upon the record, so as to enable the Court to do justice as between them and the Defendants,—then it will not allow a suit to proceed at the instance of one or more individual shareholders, as representing the whole body.

1855.

WILLIAMS

v.

SALMOND.

Judgment.

1855.
WILLIAMS
v.
SALMOND.
—
Judgment.

Now, in this case, the Defendants, having a title to indemnity to the full amount of the deposits paid by the shareholders, return, out of that amount, to all the shareholders, first an instalment of 1*l.* per share, next an instalment of 12*s.* 6*d.* per share, and then out of the same amount they propose to return a final instalment of 1*s.* 6*d.* per share.

As to the shareholders who accepted the final instalment, I concur with what was said in the reply, that they are disposed of; and that, if the directors choose to take upon themselves, before the accounts are wound up, the responsibility of returning that instalment, and releasing the entire fund so far as regards such shareholders, the directors must be taken to have placed themselves for better for worse in their position, and to represent them on the record.

But as to the shareholders who did not accept the final instalment, and it was said in the reply that as many as 7000 shares are outstanding in such shareholders, what is their position with regard to the accounts? Take the Plaintiff as one of this class, and what is his position with regard to the accounts? I apprehend his position is this: by the deed of settlement the Plaintiff, in common with all other shareholders, became in effect liable to indemnify the Defendants to the full amount of the deposits upon his shares, at the rate of 2*l.* 12*s.* 6*d.* per share, against all costs, charges, and expenses which they might incur. Of the amount to which he so made himself liable to indemnify the Defendants, the Plaintiff has received back from them, pending proceedings and pending the accounts, instalments to the extent of 1*l.* 12*s.* 6*d.* per share. He now seeks to re-open the whole account. But considering the expenses to which the Defendants have been already put, and which they would be entitled, as against the shareholders, to deduct out of the deposits in their hands, and considering all the costs, which may not be inconsiderable, of the account which would have

to be directed in this suit, and which also they might fairly be entitled in like manner to deduct out of such deposits, it is by no means impossible that the result of re-opening the whole account as prayed, would be to shew that the amount the Plaintiff has received back from the Defendants is more than the amount to which, having regard to his liability under the deed of settlement, he may prove to be entitled. And if this should be the result of re-opening the whole account, then he would be bound to refund the surplus. By re-opening the whole account he makes himself answerable to the extent of the whole amount of the deposits upon his shares at 2*l.* 12*s.* 6*d.* per share, for all costs, charges, and expenses, which, under the deed of settlement, the Defendants may be entitled to deduct from the amount of the deposits on his shares. He cannot take the account prayed without subjecting himself to this liability. It is the common case of a partnership, or any other similar concern, where an indemnity has become the right of the parties administering the fund, and in settling the whole account some unforeseen expense is incurred; in which case a party seeking to have the account settled, can only have it settled upon the terms of providing for the whole of that expenditure, and accordingly refunding, if necessary, what he has received out of the common stock, in order to put all parties right and equal with reference to their engagements. And here, not only is this the case with respect to the Plaintiff, but it is the case also with respect to all the holders of the other 7000 shares which are still outstanding; no one of those shareholders could take the account prayed in this suit without subjecting himself to the same liability of refunding what he has received back, to an extent sufficient to recoup the Defendants.

Such then being the position not only of the Plaintiff, but of all the other shareholders on whose behalf this bill is filed, the Defendants have a right to insist upon having all such

1855.
 WILLIAMS
 v.
 SALMOND.
 Judgment.

1855.
 WILLIAMS
 v.
 SALMOND.
 ———
Judgment.

shareholders substantially upon the record; and the only way of getting over the difficulty would be to bring into Court the whole amount of the sums returned to them by the Defendants by the instalments of 1*l.* 12*s.* 6*d.* per share: because the Defendants have a right to look to the solvency and responsibility, not only of the Plaintiff but of all the other shareholders, who, upon taking the account as prayed, might, in the event, be liable to refund.

But independently of this objection upon the point of form—which alone would in my judgment be a fatal objection to the suit,—I am satisfied, upon the merits of the case, that the Plaintiff is not entitled to the relief prayed.

[His Honor then went into the merits, to shew that they justified this conclusion.]

Bill dismissed—Plaintiff to pay costs subsequent to order for production of documents.

1856.
 ———
Feb. 21*st.*
 LORDS
 JUSTICES.

The Plaintiff appealed from this decision.

On the hearing of the appeal, it appeared, that, before the filing of the answers in the cause, an offer was made to the Plaintiff by the Defendants to return him all the money which he had contributed to the company less the amount which he had then already received.

The Plaintiff now consented, without prejudice to any question of title to the costs of the suit, or any of them, to accept, and the Defendants, also without prejudice to any such question, consented to pay, a sum of 50*l.* in full satis-

faction of all the demands of the Plaintiff on his own account in the cause. And the only question left for decision was as to costs.

Their Lordships now, without expressing any opinion upon the question whether the Plaintiff was, or was not, entitled to a decree for an account, were pleased to order the Defendants to pay to the Plaintiff the 50*l.* pursuant to their agreement; the Plaintiff to pay to the Defendants 300*l.* on account of costs; and all further proceedings in the cause to be stayed.

1856.
WILLIAMS
v.
SALMOND.
Judgment.
LORDS
JUSTICES.
Feb. 22nd.

HARRIS v. WATKINS.

April 30th.

WILLIAM POWELL, by his will in 1844, after making certain specific devises and bequests, gave, devised, and bequeathed to his wife *Catherine* all the rest and residue of his real and personal estate and effects, absolutely, and appointed her executrix of his will. And the testator declared that the devises and bequests thereby made to his wife should be taken and considered in lieu and discharge of all money which he had borrowed out of and forming part of the trust moneys mentioned in the settlement made on his marriage with her.

The testator died on the 1st of January, 1848.

Catherine Powell died on the 4th of January, 1848, intestate, without having proved the will of the testator, and without having ever possessed herself of any of the real and personal estates or effects of the testator.

a disclaimer by her—consequently her heir was entitled to the estate, and debts claimed by her administrator as due to her from the testator were discharged.

But, *semble*, had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by the testator, the Court might have presumed a disclaimer.

Will—Presumption—Disclaimer—Election.
Devise of residuary real estate in lieu and discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator:—
Held, as between the heir and personal representative of the devisee, that, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the Court could not presume

1856.
 HARRIS
 v.
 WATKINS.
 —
Statement.

It was admitted, that a sum of 900*l.*, forming part of the trust moneys mentioned in the settlement, had been borrowed by the testator, and was due from his estate. And evidence was adduced for the purpose of shewing that a further sum of 700*l.*, further part of such trust moneys, came within the like description in the testator's will. Upon the testator's death, his widow became absolutely entitled under this settlement to the trust moneys therein comprised.

The testator's personal estate was not sufficient for payment of his debts. The clear residue of his real estate was not less than 900*l.*

The bill was filed by a creditor of *William Powell*, on behalf of himself and all other creditors, for the usual administration decree.

The cause now came on for further consideration, and upon a question reserved from Chambers.

Argument.
 —

Mr. *Rolt*, Q. C., and Mr. *Cottrell*, for the Plaintiff.

Mr. *Chandless*, Q. C., and Mr. *Hardy*, for the administrator of *Catherine Powell* :—

Catherine Powell died before she had elected to take the benefits given her by the will, upon the conditions imposed by the testator. The Court cannot make that election for her. Her administrator, therefore, is entitled to all money borrowed by the testator out of and forming part of the trust moneys mentioned in the settlement, including the 900*l.* and 700*l.*; and the claim of the heir is excluded. It is like the case of an estate given upon a condition to be performed before the estate vests in the donee, where, if the donee unfortunately dies before performing the condition, the gift fails.

[The VICE-CHANCELLOR.—*Primâ facie*, property devised vests in the devisee, until he does something to get rid of it.]

1856.
HARRIS
v.
WATKINS.
Argument.

The Court has never presumed election by a deceased person in such a case as the present.

[The VICE-CHANCELLOR.—It is not so much whether the Court will presume election, as whether it will presume a rejection of the devise.]

But this is in effect a gift upon condition that *Catherine* complied with the terms mentioned in the will. There is an act to be done by her. [The VICE-CHANCELLOR.—She is not to give a release.] Whatever may be the form of the words, an act is required upon her part, which she died without performing. Suppose it had been a devise of *Black Acre* on condition of releasing *White Acre*, would the Court presume that the devisee elected to take under the will, merely because *Black Acre* was somewhat more valuable. The devisee might have reasons of her own for preferring to retain *White Acre*.

Mr. *James*, Q. C., and Mr. *Whitbread*, for the heir-at-law; and

Mr. *Willcock*, Q. C., and Mr. *Keen*, for the customary heir, were not heard upon this part of the case.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Where an estate is devised by will, the estate passes to the devisee by virtue of the devise; and, unless there be a disclaimer by the devisee, shewing an intention on his part not to take, the estate remains in him.

Judgment.

1856.
HARRIS
v.
WATKINS.
—
Judgment.

Here the testator has not required any act to be done by the devisee; he has imposed nothing in the nature of a condition to be performed by her previously to the vesting of the estate. He has simply devised and bequeathed to her all his residuary real and personal estate and effects; and declared, that the devises and bequests made to her by his will should be taken and considered in lieu and discharge of all money he had borrowed out of and forming part of the trust moneys mentioned in their marriage settlement. The estate therefore vested in the devisee; and the devisee, by the mere circumstance of its so vesting in her, discharged the testator's estate from all money borrowed by him out of and forming part of the trust moneys mentioned in the marriage settlement. This is the result—provided the devisee did not disclaim.

In this case there is no evidence of any disclaimer, and the only question is, whether, having regard to the circumstances of the devisee's death, and to the relative values of the estate devised and of the debts to be discharged, the Court is called upon to presume a disclaimer.

Whether circumstances might not exist under which the Court would be justified in presuming a disclaimer, is a question of some nicety. I am not aware of any authority upon the point, but I apprehend that in a strong case,—for instance, if a testator devised real estate worth 10,000*l.* only, and declared that it should be taken in lieu and discharge of debts to the amount of 20,000*l.*, in such a case, it being manifest that it would be for the disadvantage of the devisee to retain the estate upon the terms mentioned in the will, the Court, in the event of the donee dying under circumstances like the present, would, as between his real and personal representatives, struggle hard to presume a disclaimer; but where it is not manifest that it would be for the disadvantage of the devisee to retain the estate upon the terms

proposed by the testator, the ground of that presumption fails, and the presumption does not arise.

1856.
HARRIS
v.
WATKINS.
Judgment.

[His Honor then investigated the evidence as to the 700*l.*, and stated as the result, that the inclination of his opinion was strongly against the conclusion that the 700*l.* fell within the description of money which the testator had borrowed out of and forming part of the trust moneys mentioned in his settlement—strongly, therefore, against the inference that the widow, by virtue of the devise, would be in effect releasing that sum of 700*l.* as well as the 900*l.*]

In a case of so much obscurity, I cannot say it is clear to my mind that it was for the disadvantage of the devisee to retain the estate devised to her by this will. I cannot say that this is so clear a case that the Court ought to presume a disclaimer by her; and the best decision I can arrive at is, that the devised estate passed to her heir-at-law and customary heirs, and that the debt now claimed by her administrator is discharged.

1855.

Nov. 13th,
& 14th;
Dec. 7th.

Principal and
Agent—*Del
credere*—*Sta-
tute of Frauds*,
s. 4.

WICKHAM v. WICKHAM.

THE Plaintiffs and the Defendant *Wickham* were the members of a copartnership, called the *Low Moor Iron Company*, and carried on the business of iron masters and manufacturers of iron.

Semble, a contract for a *del credere* agency is not a promise to answer for the debt of another within the 4th section of the Statute of Frauds, on the authority of *Couturier v. Hastie* (8 Exch. 40), and observations on that case.

Appropriation of Payments.

The firm of *J. F. & Sons*, as agents of the Plaintiffs, supplied goods to the firm of *S. & W.*

upon the footing of the latter becoming debtors to the Plaintiffs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of the Plaintiffs, and those which they supplied on their own behalf. *E. F.* was a partner in both firms:—*Held*, that communications made by the firm of *J. F. & Sons* to the Plaintiffs, admitting a large debt to be due from the firm of *S. & W.*, and undertaking that *E. F.* would use his influence as a partner with *S. & W.* to secure its reduction, upon the faith of which communication the Plaintiffs forbore to sue *S. & W.*, precluded that firm from treating their debt to the Plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of *J. F. & Sons* in order of date.

Bankruptcy—Partnership—Election—Double Proof.

Held also, that, under a deed of inspection, by which it was agreed that the several estates of the two firms should be administered upon the principles and according to the rules and practice of the bankrupt law, and as if acts of bankruptcy had been committed by the members of such firms respectively, the Plaintiffs were entitled to prove for the debts of *S. & W.* both against that firm and against the firm of *J. F. & Sons*.

And that this right was not affected by the circumstance that *E. F.* had survived the last of his partners in the firm of *S. & W.* upwards of two months, at the time when the act of bankruptcy was taken to have been committed.

The Plaintiffs employed the firm of *John Finch & Sons* as their agents, to sell *Low Moor* iron up to the failure of that firm in 1851.

The firm of *John Finch & Sons*, as agents of the company, supplied *Low Moor* goods on credit to (amongst others) the firm of *Smith & Willey*, in which *Edward Finch* (one of the firm of *John Finch & Sons*) was a partner. *Smith* retired from the firm of *Smith & Willey* in 1849, but the business of the latter firm continued to be carried on by *Edward Finch* and *Willey* under the firm of *Finch & Willey*; and *John Finch & Sons*, as the agents of the *Low Moor Company*, continued to supply *Finch & Willey* with *Low Moor* goods as before.

The invoices of *Low Moor* goods supplied by *John Finch & Sons*, as agents of the company, were made out in the name of the company; and all the customers were supplied on the footing of their becoming debtors to the company.

1855.
WICKHAM
v.
WICKHAM.
—
Statement.

John Finch & Sons engaged with the company to keep separate books for the entry of accounts of all goods supplied by them to the several customers of the company. But this engagement was not strictly adhered to; and in the accounts kept by *John Finch & Sons* of their transactions with the firms of *Smith & Willey* and *Finch & Willey*, no distinction was made between the goods supplied by them as agents of the company and those which they supplied on their own behalf, except that from time to time the goods were entered as "*Low Moor* iron."

On the 8th of March, 1851, *Willey* died. In the spring of the same year, the firms of *John Finch & Sons* and *Finch & Willey* became embarrassed; and on the 4th of June, 1851, they suspended payment.

On the 10th of June, 1851, a meeting of the creditors of the respective firms of *John Finch & Sons* and *Finch & Willey* was held; when it was decided that the estates of both firms should be wound up under a deed of inspection; and a deed of inspection was executed accordingly on the 12th of December following.

By this deed, to which the members of the respective firms were parties, it was, amongst other things, declared, that the several estates of the two firms should be administered, as nearly as circumstances would permit, upon the principles and according to the rules and practice of the bankrupt law of *England*, and as if acts of bankruptcy had been committed by the members of such firms respectively on the 4th of June then last; but that the firms should be

1855.
 WICKHAM
 v.
 WICKHAM.
 —
Statement.

wound up separately; and that any creditor executing the deed in respect of a debt owing from the one firm, should not be deemed to execute it in respect of a debt owing from the other firm; and that the deed should be read as if two separate deeds of inspection of the two firms had been executed by the necessary parties thereto.

The Plaintiffs claimed to be creditors of the firm of *John Finch & Sons* in a sum of 46,961*l.* 3*s.* 11*d.*, consisting partly of moneys actually received by them and interest, partly of moneys due from customers for *Low Moor* iron, and partly of a sum of 6370*l.* 15*s.* 1*d.* due in respect of dishonoured bills drawn by *John Finch & Sons* and accepted by *Finch & Willey*, and indorsed by *John Finch & Sons* to the company, on account of their general balance.

The Plaintiffs also claimed to be creditors of the firm of *Finch & Willey* in a sum of 28,911*l.* 14*s.* 2*d.*, part of the said sum of 46,961*l.* 3*s.* 11*d.*, consisting partly of a sum of 21,000*l.* claimed by them as the balance due on the old account of *Smith & Willey* for *Low Moor* iron, sold to them by *John Finch & Sons* as agents of the company, partly of a sum of 1540*l.* 19*s.* 1*d.*, being the outstanding balance of *Finch & Willey* on the new account for *Low Moor* iron sold to that firm after 31st of March, 1851, and partly of the said sum of 6370*l.* 15*s.* 1*d.*, the amount of the said bills.

These claims being disputed by the inspectors, the Plaintiffs now filed their bill against them and the several members of the two firms, charging, that the agency of *John Finch & Sons* was on the footing of a *del credere* commission, by virtue of which *John Finch & Sons* guaranteed and became responsible to the company for the price of all goods of the company sold to their customers on credit; and that, consequently, they were, at the time when they suspended payment, indebted or responsible to the company for the

whole of the said sum of £46,961*l.* 3*s.* 11*d.*; and praying, that it might be declared that the company were entitled, under the trusts of the deed of inspection, to rank as creditors upon the estate of *John Finch & Sons* for the £46,961*l.* 3*s.* 11*d.*; and also on the estate of *Finch & Willey* for the £28,911*l.* 14*s.* 2*d.*, part of the £46,961*l.* 3*s.* 11*d.*; and to receive equal dividends with the other creditors on such respective amounts, but not so as to receive on the £28,911*l.* 14*s.* 2*d.* a greater dividend from the estate of *John Finch & Sons* than with the dividends which should be paid thereon from the estate of *Finch & Willey* should amount to 20*s.* in the pound.

1855.
WICKHAM
v.
WICKHAM.
—
Statement.

The Defendants, the inspectors of the estate of *John Finch & Sons*, by their answer, submitted, that a contract for a del credere agency was an undertaking to answer for the debt of another within the meaning of the 4th section of the Statute of Frauds; that there was no sufficient contract in writing for that purpose signed by or on behalf of *John Finch & Sons*, to satisfy the statute; and that, consequently, *John Finch & Sons* were not indebted to the company for outstanding debts due from customers for *Low Moor* goods.

The Defendants, the inspectors of the estate of *Finch & Willey*, by their answer, submitted, that the £21,000*l.* outstanding on the old account of *Smith & Willey* (part of the £28,911*l.* 14*s.* 2*d.* claimed from *Finch & Willey*) was discharged by the ordinary rule as to the appropriation of payments in the order of date.

The Defendants, the inspectors of both estates, submitted, that neither with respect to the £6370*l.* 15*s.* 1*d.*, the amount of the dishonoured bills, nor with respect to any or part of the company's debt, had the company any right to receive

1855.
 WICKHAM
 v.
 WICKHAM.
 Statement.

dividends from both estates, but that the company must elect on which estate to receive such dividends.

Evidence was given of communications made to the company by the firm of *John Finch & Sons* while *Edward Finch* was a partner not only in the latter firm, but also in the successive firms of *Smith & Willey* and *Finch & Willey*, and which were relied upon as bearing upon the question of the right of *Finch & Willey* to apply to their accounts the rule as to the appropriation of payments. The effect of these communications was as follows:—In December, 1847, statements, on behalf of *John Finch & Sons*, were laid before the *Low Moor* Company, shewing, that 22,000*l.* was then due to the company from *Smith & Willey*. In the same month, *John Finch & Sons* wrote to the company, stating, that the main object they should have in view in their future transactions, and in the mode of conducting their business, would be to reduce the balance they owed the company, “and to cause *Smith & Willey* to diminish and finally liquidate theirs;” and that it was the intention of *Edward Finch* to use his influence “as partner with *Smith & Willey*” in pressing them to complete orders, to convert stock into funds to meet their engagements, and to reduce expenditure; and expressing their anticipation that there would be a considerable reduction of the debts from both firms. Similar communications to a like effect were made from time to time, from 1847 to 1850, by *Edward Finch* writing on behalf of *John Finch & Sons* to the company, representing that he was continuing his endeavours in his other capacity of a partner in the firms of *Smith & Willey* and *Finch & Willey*, to secure a reduction of the debt due from those firms successively to the company.

Argument.

Mr. Rolt, Q. C., Mr. Amphlett, and Mr. Kemplay, for the Plaintiffs :—

A contract for a del credere agency is not an undertaking or guarantee within the meaning of the 4th section of the Statute of Frauds: *Couturier v. Hastie* (a).

1855.
WICKHAM
v.
WICKHAM.
Argument.

If it be, still the original agreement, and the subsequent memoranda, letters, and accounts, signed from time to time by or on behalf of the firm of *Finch & Sons* and the former firms carrying on the same business, amount together to a sufficient contract in writing to satisfy the statute; or, if not, the long dealing between the parties upon the footing of a del credere commission amounts to a part performance of the contract, and will be considered by the Court as taking the case out of the statute.

And even if *John Finch & Sons* were not acting under a del credere commission, the Plaintiffs are entitled to consider them as the principal debtors to the company for all *Low Moor* goods sold by them to their customers, whether actually paid for or not.

The communications made to the company by the firm of *John Finch & Sons*, at a time when *Edward Finch* was a member both of that firm and of the successive firms of *Smith & Willey* and *Finch & Willey*, preclude the Defendants, the inspectors of the estate of *Finch & Willey*, from treating the 21,000*l.* as liquidated by the application of the rule as to the appropriation of payments, those communications containing distinct admissions, by which, as made by one of their partners, the firm of *Finch & Willey* were bound, that the 21,000*l.* was still due and secured by the credit of their firm. Any such application of the rule of appropriation would be a fraud upon the company.

Lastly, under the trusts of the deed of inspection, and the rules adopted in bankruptcy, the Defendants are not enti-

(a) 8 Exch. 40.

1855.
 WICKHAM
 v.
 WICKHAM.
 —
Argument.

tled to put the company to their election, on which estate they will receive dividends; but the company have a right to receive dividends from both estates, not only for the amount of the bills, but also for any part of their debt which they can shew to have been owing to them from both firms previously to their suspending payment. Each firm contained one partner who was not a partner in the other.

[They cited *Morris v. Cleasby* (a), Paley's Law of Principal and Agent, 3rd edit., p. 41, *Grove v. Dubois* (b), *Macenzie v. Scott* (c), and *Couturier v. Hastie* (d); also *Ex parte Hinton* (e), *Ex parte Johnson* (f), *Ex parte Adam* (g), *Ex parte La Foret* (h), *Ex parte Bigg* (i), *Ex parte Bank of England* (k), and *Ex parte Husband* (l).

Mr. *Hugh Hill*, Q. C., and Mr. *Selwyn*, for the inspectors of *John Finch & Sons*; and

Mr. *James*, Q. C., and Mr. *Eddis*, for the inspectors of *Finch & Willey*, insisted on the defence set up by their respective answers. Upon the question of the right of the company to a double proof, they contended, that such right, even if it could ever have been maintained, was lost in consequence of *Willey's* death; upon which the joint estate of *Finch & Willey* became the estate of *Edward Finch* alone, or subject to his order and disposition; and, applying the doctrine in *Ex parte Moulton* (m), the company lost their right to receive dividends from both estates, and were put to their election.

(a) 4 M. & Selw. 566.

(b) 1 T. R. 112.

(c) 6 Bro. P. C. 280, Toml. edit.

(d) 8 Exch. 40.

(e) 1 De G. 550.

(f) 3 De G. M. G. 218.

(g) 2 Rose, 36; S. C., 1 V. & B. 493.

(h) Cited 2 Rose, 36.

(i) 2 Rose, 37.

(k) Id. 82.

(l) 2 G. & J. 4.

(m) Mont. & Bli. 28.

[They cited *Sanders v. Vanzeller* (a), *Amos v. Temperley* (b), *Williams v. Leaper* (c), *Castling v. Auber* (d), *Edwards v. Kelly* (e), *Thomas v. Williams* (f), *Saunders v. Wakefield* (g), *Price v. Moulton* (h), *Ex parte Glendinning* (i), *Ex parte Carstairs* (k), *Gray v. Chiswell* (l), *Ex parte Hill* (m), and *University of Cambridge v. Baldwin* (n).

1855.
WICKHAM
v.
WICKHAM.
—
Argument.

Mr. Rolt, Q. C., in reply, referred, on the question of double proof, to *Ex parte Liddle* (o), and cited the following additional cases: *Ansell v. Baker* (p), *Davidson v. M'Gregor* (q), *Pritchard v. Draper* (r).

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Dec. 7th.
—
Judgment.

Three principal questions arise in this case.

The first question is, whether, at the date of the deed of inspection, any and what amount was due from the firm of *John Finch & Sons* to the Plaintiffs and the Defendant *Wickham*, the partners in the *Low Moor* Iron Company.

The second question is, whether, at the same date, any and what amount was due from the firm of *Finch & Willey* to the same company.

- | | |
|---------------------------------|----------------------------|
| (a) 4 Q. B. 260. | (i) Buck, 517. |
| (b) 8 M. & W. 798. | (k) Buck, 560. |
| (c) 2 Wils. 308; S. C., 3 Burr. | (l) 9 Ves. 118. |
| 1886. | (m) 3 Mont. & A. 182, 189. |
| (d) 2 East, 324. | (n) 5 M. & W. 580. |
| (e) 6 M. & Selw. 204. | (o) 2 Rose, 34. |
| (f) 10 B. & C. 664. | (p) 15 Q. B. N. S. 20. |
| (g) 4 B. & Ald. 595. | (q) 8 M. & W. 755. |
| (h) 10 C. B. 561. | (r) 1 Russ. & My. 191. |

1855
 WICKHAM
 v.
 WICKHAM.
 Judgment.

The third question is, whether the Plaintiffs and the Defendant *Wickham* are entitled, under the deed of inspection, to a double demand, or what in bankruptcy is called a double proof, against the two estates.

The first question was argued as a point of law. It was contended on the part of the Defendants, that the engagement entered into by the firm of *John Finch & Sons* was an undertaking by way of guarantee to pay the debts which might become due from the several persons to whom they sold iron, and directly within the 4th section of the Statute of Frauds; that, even if the engagement in question were a contract for a *del credere* agency, such a contract was not the less an undertaking to answer for the debt of another within the meaning of the same section; and that, in either case, by reason of the repeated changes of partnership as well in the firm of *John Finch & Sons* as in the *Low Moor Company*, there was not a continuing engagement on the part of the successive partners of either of those firms sufficient to satisfy the statute.

Now, if this engagement were a mere undertaking, by way of guarantee, to pay the debts which might become due from the several persons to whom the firm of *John Finch & Sons* sold iron, and if no question of a *del credere* agency arose, then I should probably be of opinion, for the reasons urged at the bar, that there was not such a continuing engagement as to satisfy the statute. But it is impossible, as I shall presently shew, to contend that this engagement was a mere undertaking of that description.

If the engagement entered into by the firm of *John Finch & Sons* was a contract for a *del credere* agency, then, on the other hand, I concur with what was urged on the part of the Plaintiffs, that the case of *Couturier v. Hastie* (a)

(a) 8 Exch. 40.

seems to establish that it would not operate as a guarantee, and would not be a promise to answer for the debt of another within the 4th section of the Statute of Frauds. When I look at the whole of that case, and consider the reasons given by the Judges in delivering their judgments,—though given very cautiously and guardedly—I cannot but conclude that they considered that an agent entering into a contract in the nature of a *del credere* agency, entered in effect into a new substantial agreement with the persons whose agency he undertook;—that the agreement so entered into by him was not a simple guarantee, but a distinct and positive undertaking on his part, on which he would become primarily liable: otherwise, I cannot see how the learned Judges could arrive at the conclusion that the undertaking was not within the Statute of Frauds. Certainly, the opinion of the American Judge, which one of the learned Judges referred to with approbation in delivering his judgment in *Couturier v. Hastie*, goes to the full extent which I have described.

1855.
WICKHAM
v.
WICKHAM.
—
Judgment.

But I think, that, in this case, the engagement entered into by the firm of *John Finch & Sons* stands on an entirely different footing not only from a mere contract of guarantee, but also from a contract for a *del credere* agency.

[The VICE-CHANCELLOR then examined the circumstances bearing upon the question as to the nature of the engagement, and concluded, that it was in fact a distinct primary engagement on the part of *John Finch & Sons*, to make good to the *Low Moor* Company, at the end of every year, the payments due in respect of the whole of the iron supplied by the company.]

Such being the nature of the engagement, the accounts shew, and in fact it is not in dispute, that the amount due from the firm of *John Finch & Sons* to the *Low Moor* Company is 46,961*l.* 3*s.* 11*d.*

1855.
 WICKHAM
 v.
 WICKHAM.
 Judgment.

I come now to the second question in the case, viz. whether, at the date of the deed of inspection, any and what amount was due from the firm of *Finch & Willey* to the *Low Moor* Iron Company. In considering this question I shall pass over for the present the sums of 1540*l.* 19*s.* 1*d.* and 6370*l.* 15*s.* 1*d.*; and I shall consider whether, at the date of the deed of inspection, any other amount was due to the company from the firm of *Finch & Willey*.

That there once was a debt due from that firm to the company is sufficiently apparent, for all invoices were made out in the name of the *Low Moor* Iron Company, and the customers were supplied distinctly on the footing of their becoming debtors to that company. But the difficulty, and the only difficulty in the case, is occasioned by the circumstance that the firm of *John Finch & Sons*, (doubtless from inadvertence), instead of keeping separate books for the entry of accounts of all goods supplied by them to the several customers of the *Low Moor* Company, (which was the course they had engaged with the company to pursue), in fact, kept accounts in which there was no distinction between the goods so supplied by them as the agents of the company, and the goods supplied by them on their own behalf, except in this respect, that, from time to time, the goods were entered as "*Low Moor* iron." In other respects, the whole was kept in one general account, their transactions on behalf of the company being blended with all their other transactions with the firms of *Smith & Willey* and *Finch & Willey*. In this general account, which, as early as 1846, shewed a very heavy balance due to *John Finch & Sons*, entries were made from time to time on one side and on the other until *Willey's* death, when it resulted in a balance of 22,000*l.* due from the firm of *Finch & Willey* to the firm of *Finch & Sons*.

In this state of things, there is no doubt that if *Edward*

Finch had not been a partner both in the firm of *John Finch & Sons* and in that of *Smith & Willey*,—if the partners in the latter firm had been strangers to the transactions between the firm of *John Finch & Sons* and the *Low Moor* Company, then the firm of *Smith & Willey* would have been at liberty to apply, in dealing with their accounts, the ordinary rule relative to the appropriation of payments,—the rule in *Clayton's case* (a), which has been always followed, according to which the party against whom the balance is eventually due is at liberty to appropriate all the successive payments made by him in reduction, from time to time, of the earlier portion of the account. And it is said, (although this is not made out by the evidence), that if the rule in question were strictly applied in the present instance, and the payments made by the firm of *Smith & Willey* were appropriated successively in reduction of the earlier items due from that firm, the result would be the wiping out of the whole debt due in respect of the *Low Moor* iron from the firm of *Smith & Willey*.

1855.
WICKHAM
v.
WICKHAM.
Judgment.

But the fact is, that *Edward Finch* was a partner both in the firm of *John Finch & Sons* and in the firm of *Smith & Willey*. In 1833 he became a partner in the firm of *John Finch & Sons*. In January, 1844, he became a partner, although his name did not appear as a partner, in the firm of *Smith & Willey*; and while he was occupying that double position, communications passed between the firm of *John Finch & Sons*, of which he was a partner, and the *Low Moor* Iron Company, which, in my judgment, render it impossible to apply the rule in *Clayton's case* to these accounts.

[His Honor read these communications to the effect stated above, and proceeded.]

That it was competent to *Edward Finch*, as a member of

(a) 1 Mer. 572.

1855.
 WICKHAM
 v.
 WICKHAM.
 —
Judgment.

the successive firms of *Smith & Willey* and *Finch & Willey*, to make arrangements for the reduction of debts due from those firms, is plain. His house being under liabilities, it became his proper business to make arrangements for their liquidation, and to enter into such correspondence with creditors as might be necessary for that purpose. And after such representations made by him, or by the firm of *John Finch & Sons* of which he was a partner,—representations not for the benefit of *John Finch & Sons* only, but most materially affecting the interests of the firms of *Smith & Willey* and *Finch & Willey*, (because it was on the faith of those representations that the company forbore suing the latter firms,—it was on the faith of those admissions by *Edward Finch*, as a member of those successive firms, to the effect that there was this large debt outstanding and still due to the company, and that the company had therefore the security of Mr. *Smith* whatever it might be worth, and the security of Mr. *Willey* whatever it might be worth, in addition to the security which they had already from the firm of *John Finch & Sons*, that the company forbore to sue the firms of *Smith & Willey* and *Finch & Willey*)—after all these representations it is impossible, alike for the firm of *Finch & Willey* and for that of *John Finch & Sons*, to say, that, notwithstanding all that had passed, there was an arrangement between their firms by which they kept their accounts all as one joint account, and that, by applying the doctrine of appropriation of payments to all moneys paid in by *Smith & Willey* or *Finch & Willey* to the firm of *John Finch & Sons*, they are entitled to consider that debt, which one of their partners so admitted to be due, as a debt which has been liquidated by the appropriation of those payments in order of date. As between *John Finch & Sons* and the successive firms of *Smith & Willey* and *Finch & Willey*, that doctrine would no doubt apply; but as between the *Low Moor Company* and those firms, it was not competent for either of such firms so to arrange their accounts as to re-

sult in the liquidation of a debt, which a common member of both firms had thus represented to the company as outstanding. It appears to me, therefore, that when I direct an inquiry as to the amount due to the company in respect of these transactions, I must give such directions as will prevent the doctrine of appropriation from being thus applied by the Defendants.

1855.
WICKHAM
v.
WICKHAM.
—
Judgment.

That an inquiry must be directed is clear. I cannot hold that the mere statement of one partner in a firm, to the effect that there is a debt due from such firm, is in itself sufficient to bind his copartner as to the amount so admitted to be due; and as I cannot say, upon the evidence in this case, that the amount due from the Defendants *Finch & Willey*, in respect of the transactions now in question, is distinctly ascertained, the proper course will be to direct an inquiry upon the subject, in the terms which I shall presently mention.

There remain the two sums of 1540*l.* 19*s.* 1*d.* and 6370*l.* 15*s.* 1*d.* already mentioned, which, being clearly due from the firm of *Finch & Willey*, would, under any circumstances, have made it necessary to determine the third question in this cause. The 1540*l.* 19*s.* 1*d.* is due for iron supplied through *John Finch & Sons* to the firm of *Finch & Willey*, after the 31st of March, 1851. And as to the 6370*l.* 15*s.* 1*d.*, the amount of dishonoured bills drawn by *John Finch & Sons* on *Finch & Willey*, accepted by *Finch & Willey*, and indorsed by *John Finch & Sons* to the *Low Moor Company*, I apprehend that the bills so indorsed gave the company a good claim on the estate of *Finch & Willey*. In cases of bankruptcy, the rule as to the right of proof by a creditor holding a security is, that, where the security is that of the bankrupt alone, the creditor cannot prove without giving up his security; but where it is the security, not of the bankrupt only, but of a third party, then the creditor may prove

1855.
 WICKHAM
 v.
 WICKHAM.
 ———
Judgment.

for the full amount of the debt, and still retain the security for the amount for which he has the additional security of such third party. That is the position in which the *Low Moor* Company stands with reference to the bills accepted by the firm of *Finch & Willey*. The rule last mentioned has a direct bearing upon the third and last question in this case.

The third and last question is, whether the Plaintiffs and the Defendant *Wickham* are entitled, under the deed of inspection, to a double demand, or double proof, as it is called, against the two estates.

Whatever may be the true construction of the deed of inspection upon other points, as to which some discussion arose in the argument, it is admitted to have operated as an agreement by all the parties, that the estates of the two firms should be administered as if both firms had committed acts of bankruptcy on the 4th of June, 1851.

The question, therefore is, what would be the effect of holding both these firms to have committed acts of bankruptcy on that day.

It was argued, that, *Edward Finch* having survived his partner *Willey*, the whole estate was in truth the estate of *Edward Finch*. That of course is not so. The point is expressly determined in *Ex parte Leaf* (a), where an attempt was made to take a distinction upon the question of order and disposition, and the facts were, in some respects, favourable to that view. There, a sum of money, standing in the books of the bank to the credit of the deceased partner and of the surviving partner, who became bankrupt, had been drawn out by the surviving partner for a particular purpose, upon an undertaking to return it if the purpose failed; and

(a) Mont. & C. 662.

the purpose did fail. It was argued, that the money was left in the order and disposition of the surviving partner, and that his drawing it out of the bank raised a strong inference to that effect; but the Court held, that the purpose having failed, the whole was remitted to its former position; and that, there not having occurred a sufficient lapse of time, (for time would be an important ingredient in estimating the question of order and disposition), it was impossible to say that the money ceased to be part of the joint estate; consequently, the money so dealt with must be treated as joint estate, and applicable for payment of the joint debts of the partnership. The same point was assumed in *Ex parte Taylor(a)*, where again the whole question turned on reputed ownership. It was conceded, that a large part of the property was to be administered as the joint estate of the bankrupt partners and of their deceased partner; but as to certain of them, there was a dispute whether there was reputed ownership; and it was held, that, as to some parts of the property in question, there was, but as to others there was not. Here, there can be no question of reputed ownership. *Willey* died in March, 1851, and, according to the deed of inspection, the firm is to be deemed to have committed an act of bankruptcy on the 4th of June following. It does not appear that administration was taken out; but, if it was, that circumstance is not material. There evidently had not been such a lapse of time as would induce the Court to say that *Edward Finch* had acquired (or rather, that his assignees would have acquired) the whole of this property by any doctrine of reputed ownership. It remained part of the joint estate of *Finch & Willey*.

Then, since the property remained the joint estate of *Finch & Willey*, it follows as a necessary consequence, that the doctrine of *Ex parte Moulton (b)*, as it was termed in argument, has no application. That doctrine—which in truth had been

1855.
WICKHAM
v.
WICKHAM.
Judgment.

(a) Mont. 240.

(b) Mont. & B. 28.

1855.
 WICKHAM
 v.
 WICKHAM.
 —
Judgment.

acted upon, after some conflict of opinion, in many earlier cases—is simply this, that you cannot claim through the medium of one partner against the partnership. Consequently where, as in *Ex parte Moulton*, a party is engaged in two trades,—engaged alone in one trade, but with a copartner in another,—you cannot, in respect of his dealings as such sole trader, have any right of proof against the estate of his copartner. That doctrine was followed by the Chief Judge in bankruptcy, the present Lord Justice *Knight Bruce*, who considered himself bound by it, although he expressed that he did not himself acquiesce in it. In a case in which three persons, partners in a firm of six, were engaged in a separate trade, he seemed to consider that the same rule was applicable (a). But, in the present case, there is a stranger introduced. The securities are not the securities of *Edward Finch* alone, but of *Finch & Willey*, and *Willey* had no concern whatever in the firm of *John Finch & Sons*. It is, therefore, a collateral security which the company has acquired, and one on which they have a distinct right of proof.

It was scarcely disputed that the company would be entitled to a right of double proof, provided the estate were held (as I have held it) to be the joint estate of *Finch & Willey*, and not that of *Edward Finch* alone. But if authority were required, *Ex parte Adam* (b) is an express authority in point. There a stranger was introduced into one of the two firms, and that circumstance was held to bring the case within the application of the rule to which *Ex parte Moulton* was an exception; viz. that where there are two firms, and one of them contains one partner who is a stranger to, as well as one partner who is a member of, the other, there you may prove the paper of both firms against the estates of both.

Such being the rule, the right of double proof, in case both the firms now in question had become bankrupt, would be clear.

(a) *Ex parte Hinton*, 1 De Gex, 550. (b) 2 Rose, 36; S. C., 1 V. & B. 493.

The result therefore is, that, under the deed of inspection, the company is entitled to prove the whole 46,961*l.* 3*s.* 11*d.* against the estate of *John Finch & Sons*; and to prove the 1540*l.* 19*s.* 1*d.*, the 6370*l.* 15*s.* 1*d.*, and such further sum as shall be found due upon the account which I am about to direct, against the estate of *Finch & Willey*, subject of course to their not receiving more than 20*s.* in the pound.

1855.
WICKHAM
v.
WICKHAM.
Judgment.

DECLARE, that the Plaintiffs and the Defendant *Wickham*, the partners in the firm of the *Low Moor* Company, are entitled, under the trusts of the deed of inspection, to rank as creditors upon the estate of *John Finch & Sons* for the debt or sum of 46,961*l.* 3*s.* 11*d.*; and also to rank as creditors upon the estate of *Finch & Willey* for the following sums, part of such last-mentioned sum; (that is to say), the sum of 6370*l.* 15*s.* 1*d.*, being the amount of the bills drawn by *John Finch & Sons*, and accepted by the firm of *Finch & Willey*, and indorsed by *John Finch & Sons* to the said company; the sum of 1540*l.* 19*s.* 1*d.*, being the balance due from *Finch & Willey* to the said company for *Low Moor* iron sold to them after the 31st day of March, 1851; and such further sum as on the inquiry hereinafter directed shall be found to have been due to the said company from the firm of *Finch & Willey* on the 4th day of June, 1851, but so as not to receive from the estates of *John Finch & Sons* a greater dividend on the amount for which the said company shall rank as creditors on the estate of *Finch & Willey*, than with the dividends to be received from the last-mentioned estate shall amount in the whole to 20*s.* in the pound.

Minute of
Decree.

And let an inquiry be made what sum of money, other than the said two sums of 6370*l.* 15*s.* 1*d.* and 1540*l.* 19*s.* 1*d.*, was, on the 4th day of June, 1851, due from the firm of *Finch & Willey* to the said company on the whole of the transactions between the firm of *John Finch & Sons*, as agents of the said company, and the successive firms of *Smith & Willey* and *Finch & Willey*; and in making such inquiry, all sums of money which shall be credited to the said firms of *Smith & Willey* and *Finch & Willey* in the accounts between the firm of *John Finch & Sons* and the respective firms of *Smith & Willey* and *Finch & Willey*, and shall not have been expressly appropriated to the payment of moneys due to the said company, shall, in the first instance, be appropriated in satisfaction of any moneys due at the date of such credit to the firm of *John Finch & Sons* on their own account, and not as agents of the said company.

1856.

March 15th.

FRASER v. KERSHAW.

*Partnership—
Bankruptcy—
Right to sell
of solvent
Partner—Of
Execution Cre-
ditor—Injunc-
tion.*

—
The power of a solvent partner, upon the bankruptcy of his copartner, to sell the partnership property, is given him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such share and interest is taken in execution.

JOHN Travis and Thomas Kershaw, from March, 1855, to the end of January, 1856, carried on business as cotton spinners in copartnership, under the firm of *Travis & Kershaw*.

On the 12th of February, 1856, the Defendant *Ann Kershaw*, being a creditor of *Thomas Kershaw*, obtained a judgment against him for 162*l.* 8*s.* 7*d.*

On the 19th, *Travis* was adjudicated a bankrupt. The Plaintiff was appointed assignee of his estate and effects, of which possession was taken by the messenger of the Court of Bankruptcy on the same day.

On the 20th, machinery, materials, and utensils in or about the cotton mill, and which formed part of the copartnership property, were seized by the sheriff under a writ of *fiery facias* issued upon the judgment obtained by the Defendant; and, on the same day, the share, right, and interest of *Thomas Kershaw* in the said machinery, materials, and utensils were sold by the sheriff to the Defendant.

Shortly afterwards, the same machinery, materials, and utensils were advertised for sale by auction, to be held on the 27th of February. Such sale was advertised as being

Where partnership goods had been taken in execution upon a *bonâ fide* judgment against a solvent partner whose copartner was bankrupt, upon bill filed by the assignee, an injunction was granted to restrain the judgment-creditor, who had purchased all the share, right, and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser.

And *held*, that the Plaintiff had not deprived himself of his right to this injunction by his own misconduct, in violently putting the Defendant out of possession.

Tenant in Common—Trovcr.

Observations on the rule that one tenant in common cannot maintain trover against another.

on the instructions of the Defendant, who was described as the owner of the property.

1856.
FRASER
v.
KERSHAW.
Statement.

On the 26th of February *Travis* and *Thomas Kershaw* were adjudicated bankrupts, and the Plaintiff was appointed official assignee of their joint estate and effects, of which, on the same day, possession was taken by the messenger of the Court.

Notices, stating that the goods advertised for sale were part of the property of the copartnership, and requiring that no sale should be attempted, were served by the Plaintiff on the Defendant, her solicitor, and the auctioneer, before the time fixed for the sale. The Plaintiff also issued an advertisement, stating, that the goods in question were part of the copartnership property, and were then vested in the Plaintiff as official assignee, and cautioning the public against purchasing.

The Defendant thereupon issued a counter advertisement, stating, that the machinery and effects advertised for sale were her absolute property under a purchase made by her for full value from the sheriff; that the Plaintiff had no title; and that she would indemnify the purchasers.

The sale proceeded, all the said machinery, materials, and utensils were sold, and the Defendant received deposits from the purchasers.

The Plaintiff then filed his bill for an account, and to have the rights of the parties declared; and for an injunction to restrain the Defendant from delivering possession of the said machinery, materials, and utensils to the purchaser or alleged purchaser, and from otherwise selling or disposing thereof, and from in any manner intermeddling with the copartnership property so as to interfere with the rights of

1856.
FRASER
v.
KERSHAW.
Statement.

the Plaintiff as official assignee of the estate and effects of *John Travis* and *Thomas Kershaw*; and for a receiver.

It appeared that the Plaintiff had violently put the Defendant out of possession of her moiety of the goods in question; upon which the Defendant was about to recover possession by force but was deterred by the opposition to be encountered.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Field*, now moved for an injunction and receiver, as prayed.

The Defendant, purchasing of the sheriff, became tenant in common with the Plaintiff: per Lord *Holt* (a); *Collyer* on Partnership, 2nd edit., p. 560. The Plaintiff might have filed a bill against the sheriff to restrain him from proceeding under the execution, and selling the stock and effects; much more is the Plaintiff entitled to this injunction.

[They referred to the cases cited in *Collyer* on Partnership, pp. 560, 564, and *Young v. Keighly* (b), *Taylor v. Fields* (c), *Bevan v. Lewis* (d), *West v. Skip* (e).]

Mr. *Daniel*, Q. C., and Mr. *Rogers*, for the Defendant.

The motion must be refused. In such a case as this trover would not lie against the Defendant, for one tenant in common cannot maintain trover against another: *Mayhew v. Herrick* (f); and the Plaintiff is tenant in common with the Defendant.

Besides, the bankruptcy of *Travis* gave *Thomas Kershaw*, as the solvent partner in the firm, a right to sell the part-

(a) 1 Salk. 392.

(b) 15 Ves. 557, 559, et seq.

(c) Id. 559, n.

(d) 1 Sim. 376.

(e) 1 Ves. sen. 242.

(f) 7 C. B. 229.

nership property for payment of partnership debts: *Fox v. Hanbury* (a). And this right has passed through the sheriff to the Defendant. The Defendant selling may be liable to account; but the motion assumes, that the sale is so radically vicious, that the Court *ab ante* can interfere.

1856.
FRASER
v.
KERSHAW.
—
Argument.

The Plaintiff has deprived himself of his right (if he ever had any) to this injunction by his own misconduct in violently putting the Defendant out of possession.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Upon the legal questions raised there cannot, I think, be a shadow of doubt. The authorities cited seem to be all one way.

Judgment.

The bankruptcy of *Travis* put an end at once to the partnership, before execution was taken out against *Thomas Kershaw*; and the one partner being bankrupt, the Plaintiff, as his assignee, became tenant in common with the other.

The case of *Mayhew v. Herrick* (b), cited for the Defendants, seems to me to make out the reverse of the proposition for which it was cited. That case determined that one tenant in common could not maintain trover against the other, because it was not shewn that his title had been displaced, or that he could not follow his interest in a moiety of the property into the hands of the purchaser. What each of the Judges says in that case bears that construction, and that only. Mr. Justice *Maule* puts it with remarkable clearness. He says, that the old doctrine about tenancy in common

(a) Cowp. 445.

(b) 7 C. B. 229.

1856.
 FRASER
 v.
 KERSHAW.
 Judgment.



(meaning the doctrine that one tenant in common cannot maintain trover against another) is not to be pushed to its full extent. "There may be dispositions of the subject-matter which will amount to conversion if done by a stranger, that are not so if done by a tenant in common. But I do not think it therefore follows, that no dealing with the thing by one of two tenants in common that does not amount to a total annihilation of it," (the old law allowed that to be conversion), "if that be possible, can be a conversion as against his co-tenant. It may be that the co-tenant may, if he think fit, follow the thing and make title to it, notwithstanding its sale and delivery to a third person." (In that case, of course, there would not be trover, because he would only be tenant in common with the purchaser. One tenant in common may sell his moiety, and if the purchaser chooses to have the thing—a horse, for instance, or whatever else it may be—in his possession, the tenant in common may deliver it; but he will not pass more than his own moiety, unless it be by a sale in market overt). "But it does not follow, that, where one tenant in common has dealt with the subject to an extent exceeding his authority,—as where he sells out and out to a number of purchasers who carry away the articles," (the very thing which the Defendant in the present case attempts to let them do), "it would militate against the true understanding of the older authorities to hold that the party may treat that as a conversion."

I have, therefore, the clear authority of Mr. Justice *Maule*, that, in a case such as that now before me, trover would lie, unless the attempted sale could be supported upon the ground of what is laid down in *Fox v. Hanbury* (a). The Defendant has attempted to sell in market overt: had she succeeded the title would have been changed, there would have been a tortious conversion, and the Plaintiff, as tenant in common, might have maintained trover.

(a) Cowp. 447.

Then as to *Fox v. Hanbury*, it appears to me, that in the argument from that decision, as to the rights of a solvent partner, there is a transparent fallacy. *Fox v. Hanbury* decided, that, if one of two partners becomes bankrupt, the solvent partner, in winding up the affairs of the partnership, has a right to sell the partnership property to pay the partnership debts. But it does not follow that this right can be transferred to another. The solvent partner would not be able to assign over to another, as part of "all his right and interest," the power of sale so vested in him for the payment of debts. That power is a personal authority, personal to him in his capacity of partner, and which he may exercise in that capacity. Still less can it be inferred from the authority of *Fox v. Hanbury*, that a solvent partner, by exposing himself, although perfectly bonâ fide, to a judgment, and allowing his share to be taken in execution, can pass to the sheriff any such power of selling the partnership property for the purpose of winding up the partnership affairs. The sheriff can have no such power any more than a stranger has such power. It is a power confined to the partner himself, which when exercised bonâ fide the Courts have maintained, to enable him to proceed in winding up the partnership affairs in due course.

None of the authorities which have been cited touch the case before me. Here the sheriff has taken the goods in execution, and then handed over, and properly handed over, all the right and interest so seized of one partner to the Defendant. The Defendant, thereupon, having only that right and interest in the property, advertises the whole of the property for sale as if the whole of it were her own, and on receiving a notice that such a proceeding is improper, she re-asserts her right to take such a proceeding. And if the whole property could have been sold in market overt, the whole would have passed to the purchaser, and the assignees would have been deprived of that which is their clear right,

1856.
FRASER
v.
KERSHAW.
Judgment.

1856.
 FRASER
 v.
 KERSHAW.
 Judgment.

viz. to have the affairs of the partnership wound up, and the property of the partnership sold, under the direction of the Court.

The consequence is, that the Defendant must be restrained from making any attempt to deliver over the goods in question, and so displacing the rights of the Plaintiff.

It was argued, that the Plaintiff has deprived himself of any right he might otherwise have had to an injunction, by his own misconduct in violently putting the Defendant out of possession. The conduct of the Plaintiff in this respect was certainly unjustifiable, for the Defendant was as much a tenant in common as the Plaintiff, and had as good a right to quiet possession of her share as the Plaintiff had to such possession of his. The Defendant, however, without any reason, insists on her right to exclusive possession of the whole of the property, and the Plaintiff having put her forcibly out of possession, she goes with her army to recover possession of the whole. She found the opposing forces too strong, and happily no conflict took place. Those who began such a state of things are to be censured, but the censuring them will not prevent the Court from interfering by injunction to stop its continuance. It is a main object of the exercise of this jurisdiction to prevent parties from going on in such a course; and it is plain, that, in the present case, the Defendant insists on her right, and would deliver, if it were in her power to do so, the whole of the property to the purchaser. It is high time that such irregular proceedings should be stopped; and whatever question may arise hereafter in reference to the misconduct of the Plaintiff, this is not the time to discuss it.

*Minute of
 Order.*

ORDER for an injunction in terms of the motion as above, and for a receiver to get in and realise the copartnership property.

1856.

KNIGHT v. ROBINSON.

May 7th.

A SPECIAL case under the 13 & 14 Vict. c. 35.

The question was, whether the legal estate of certain mortgaged hereditaments, which was vested in one *Thomas Minter* at the date of his will, was effectually devised thereby under the term "securities for money," to the Plaintiff *Jane Catherine Knight*, then *Minter*, and whether the concurrence of the testator's heir-at-law was necessary to make an effectual conveyance of the mortgaged premises to the Defendant.

By his will, which bore date 1832, the testator, after giving and bequeathing several pecuniary legacies, gave and devised as follows:—"And as to all my money, securities for money, household furniture, fixtures, plate, linen, china, goods, chattels, and all other the rest and residue of my personal estate and effects whatsoever and wheresoever (subject to the payment of my just debts and funeral and testamentary expenses, and the legacies hereinbefore given and bequeathed), I give and bequeath the same, and every part and parcel thereof, unto my dear wife *Jane Catherine Minter*, her executors, administrators, and assigns absolutely." The testator appointed his wife and two others executrix and executors of his will. The will contained no devise sufficient to pass estates of inheritance vested in the testator as mortgagee, unless the devise and bequest in favour of his wife were sufficient in law for that purpose.

*Will—Construction—
"Securities for Money"—
Mortgage—
Legal Estate.*

Testator, by his will in 1832, gave all his money, securities for money, household furniture, &c., and all other the rest and residue of his personal estate and effects, subject to the payment of debts and legacies, to his wife, her executors, administrators, and assigns absolutely:—*Held*, that the legal estate of certain mortgaged hereditaments, which was vested in the testator at the date of his will, passed under the term "securities for money;" and that the concurrence of the testator's heir was not necessary to make an effectual conveyance of the mortgaged premises to a purchaser.

Mr. *Fooks* for the Plaintiff.

Galliers v. Moss, (9 B. & C. 267), must

be treated as overruled by subsequent decisions.

1856.
 KNIGHT
 v.
 ROBINSON.
 —
Argument.

The legal estate in the mortgaged hereditaments passed by the words "securities for money." The rule now is, that those words, like the word "mortgages," and similar expressions, will comprise the entire benefit of the mortgaged security, including the inheritance in the lands, unless a contrary intention appears by the context; and that the fact of such words being found among terms descriptive exclusively of personal estate, and followed by a limitation to executors and administrators only, and not to heirs, will not affect the construction: the broad principle being, that the testator meant to substitute the object of his bounty in his own place as mortgagee, and to enable him to enforce payment of the mortgage money, by giving him the legal estate in the mortgaged lands: *Renvoize v. Cooper* (a), *In re King's Mortgage* (b), *In re Field's Mortgage* (c), *In re Walker's Estate* (d), and Mr. Jarman's Treatise on Wills, 2nd edit., pp. 597—601, and the cases there cited.

Mr. G. L. Russell for the Defendant, who had contracted to purchase the estate:—

The legal estate did not pass to the Plaintiff by virtue of the testator's will; and the Plaintiff cannot, either alone or with her co-executors, make an effectual conveyance to the Defendant of the mortgaged hereditaments without the concurrence of the testator's heir-at-law.

The rule is, that the construction to be put upon the term "securities for money" must in all cases depend upon the intention of the testator; but such intention is to be gathered from the whole of his will; and if in his will he has not shewn an intention to pass the real estate, the Court cannot do what the testator has not done: *Galliers v.*

(a) 6 Madd. 371.

(b) 5 De G. & S. 644.

(c) 9 Hare, 414.

(d) 30 L. J., Chanc., 675.

Moss (a), and *Doe d. Roylance v. Lightfoot* (b), following *Silvester v. Jarman* (c).

1856.
KNIGHT
v.
ROBINSON.
—
Argument.

[The VICE-CHANCELLOR.—Vice-Chancellor *Parker*, in *Re King's Mortgage*, said, that *Galliers v. Moss* must be considered to have been overruled by the subsequent decisions.] *Doe d. Roylance v. Lightfoot* was not cited before Vice-Chancellor *Parker*. [The VICE-CHANCELLOR.—In that case the words “securities for money” were not found in the will. Then *Doe d. Guest v. Bennett* (d) is against you.] There the testator shewed he was contemplating moneys secured on mortgage, and the same remark applies to *In re Field's Mortgage*.

I rely on this: first, that the testator in making this bequest intended to give personal estate only, for, after giving these “securities for money,” he adds, “and all *other* the rest and residue of my *personal estate and effects*.” Secondly, he has given such securities for money “subject to the payment of his debts and legacies,”—a circumstance which always rebuts the presumption that a testator intended to pass mortgage or trust estates by a general devise, since, to hold otherwise, would be to throw such debts and legacies upon the mere dry, naked trust. And thirdly, the gift is to the Plaintiff, her executors, and administrators, her heirs not being mentioned.

[He cited also *In re Horsfall* (e).]

A reply was not heard.

(a) 9 B. & C. 267.

(b) 8 M. & W. 553.

(c) 10 Price, 78.

(d) 6 Exch. 892.

(e) M'Cl. & Y. 292.

1856.
 KNIGHT
 v.
 ROBINSON.
 Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

It appears to me, that the view taken by Vice-Chancellor *Parker* in *Re King's Mortgage* (a), is founded both upon principle and authority. The only distinction between that case and the present is, that, in the former, the gift was to the testator's wife, "she paying thereout" all the testator's debts, while here the gift is "subject to the payment of" the testator's debts and legacies.

It is perfectly true, that, where there is a general devise of all a testator's real, or of all his real and personal estate, subject to debts, or to debts and legacies, there, as in *Doe d. Roylance v. Lightfoot* (b), a dry legal estate in mortgage and trust estates will be held not to pass, because, to hold the contrary, would be, quoad such estates, to throw the debts, or debts and legacies, upon a mere dry and naked trust estate. But when, as here, you get words such as "securities for money," then the observation of Sir *John Leach* in *Renvoize v. Cooper* (c), cited by Vice-Chancellor *Parker* in *Re King's Mortgage* (d), applies: "I am of opinion," Sir *J. Leach* says, "that the mortgaged fee will pass to the wife by the subsequent gift of mortgages and other securities for money, though coupled with personal property. In substance, money secured by a mortgage in fee is personal property, and a gift of a mortgage security for money is a gift of all the testator's interest in the money and security, and will therefore pass the fee." So in *Doe d. Guest v. Bennett* (e), where the will contained a direction that the testator's wife was to receive "all moneys upon mortgages," it was held, that the wife took the legal estate in the mortgage in fee, and for this reason, viz. that unless such were the case she could get nothing. "It must be assumed," said

(a) 5 De G. & S. 646.

(b) 8 M. & W. 553.

(c) 6 Madd. 373.

(d) 5 De G. & S. 647.

(e) 6 Exch. 892.

Parke, B., "that the testator intended the wife to receive the money, and to possess all the powers necessary for the purpose of recovering it; and therefore she is entitled to bring ejectment for that purpose." In fact, in all these cases, the testator has not given the benefit of the security unless he has given the legal estate. And to hold that he has given the legal estate in a case where, as here, he has given the security subject to the payment of his debts, is not to throw such debts upon a mere dry trust estate, because the donee can pay such debts out of the moneys recoverable upon the security. Therefore, in my opinion, the circumstance of this gift being subject to the payment of the testator's debts and legacies, does not make against the construction for which the Plaintiff contends.

1856.
 KNIGHT
 v.
 ROBINSON.
 Judgment.

The strongest argument urged against that construction was that which was founded upon the circumstance of the enumeration of the securities and other subject-matters of this gift being followed by the words—"and all *other* the rest and residue of my *personal* estate and effects," which point, it was said, to the inference that bonds, and other securities short of the legal estate in a mortgage in fee, were exclusively intended by the testator. In answer to that, I refer to what Vice-Chancellor *Parker* says in *Re King's Mortgage*: "It has been said, that the words 'securities for money' in this will were placed among words relating to personal estate; but that is the place in the will in which they might be expected to be found, the mortgage money being in fact personal estate."

Here it is impossible to say that the Plaintiff does not take the beneficial interest. Therefore, I think she takes the legal estate, because that is the only means of effectuating the testator's intention.

I agree with Vice-Chancellor *Parker*, that *Galliers v.*
 VOL. II. L L K. J.

1856.
 KNIGHT
 v.
 ROBINSQN.
 —
Judgment.

Moss (a) must be treated as overruled by the subsequent decisions. I also concur in what he says (b), that it cannot be reconciled with *Ex parte Barber* (c) or *Mather v. Thomas* (d).

It appears to me, that it would be "throwing the law back," as Vice-Chancellor *Parker* expressed it, if I held, that, in this case, the legal estate in the mortgage in fee did not pass by the words "securities for money."

Mr. *Fooks* called his Honor's attention to the fact, that, in *In re Walker's Estate*, the will contained the words "and all other my personal estate and effects" in context similar to the present.

*Minute of
 Decree.*
 —

DECLARE, that the legal estate of the mortgaged hereditaments, which was vested in the testator at the date of his will, was effectually devised thereby under the term "securities for money" to the Plaintiff *Jane Catherine Knight*, then *Minter*; and that the concurrence of the heir-at-law of the testator is not necessary to make an effectual conveyance of the mortgaged premises to the Defendant.

(a) 9 B. & C. 267.

(b) 5 De G. & S. 647.

(c) 5 Sim. 451.

(d) 6 Sim. 115; and see 10 Bing. 44.

1856.

BLAGRAVE v. ROUTH.

April 28th &
29th.

BY an indenture of mortgage, dated March, 1848, and made between *Anthony Blagrove* (the father of the Plaintiff), of the first part, the Plaintiff *John Henry Blagrove*, of the second part, and the Defendant of the third part, *Anthony Blagrove* and the Plaintiff, in order to secure to the Defendant, his executors, administrators, or assigns, the repayment of 2542*l.* 7*s.* 11*d.*, therein expressed to be due and owing from *Anthony Blagrove* and the Plaintiff to the Defendant, with interest at 5*l.* per cent., conveyed and assured certain manors and hereditaments in the counties of *Somerset* and *Berks*, to the Defendant, his heirs and assigns, subject to a proviso for redemption on payment by *Anthony Blagrove* and the Plaintiff, or either of them, their or either of their heirs, executors, or administrators, to the Defendant of the sum of 2542*l.* 7*s.* 11*d.*, and interest.

On the indenture was indorsed a memorandum, signed by the Defendant, in these words:—"Memorandum, that the interest which shall accrue during the life of Colonel *John Blagrove* shall not be required to be paid until six months after his decease."

On the 19th of May, 1854, the Plaintiff filed his bill to set aside this indenture, and three other securities in the bill mentioned.

ing that the Defendant had delivered the bill of costs at the time agreed on between him and the Plaintiff, and five years and a-half before bill filed, and that the Plaintiff had had ample opportunity for discovering the errors, if any.

The proposition in *Lawless v. Mansfield* (1 Dr. & W. 611), that a general charge is sufficient to open accounts between a solicitor and his client, is in conflict with the rule of the Court of Chancery in *England*, which is, that, if the party seeking to set aside a security for the amount of a bill of costs relies on fraud, or error amounting to evidence of fraud, in the bill of costs, he must aver and prove the specific items, upon which he means to rely, to be fraudulent or erroneous.

Solicitor and Client—Security for Costs—Bill to set aside—To re-open Accounts—Pleading—Averment.

Bill to set aside a security for a sum therein expressed to be due, but which was in fact the estimated amount of past costs in a suit, executed by a client in favour of his then solicitor pending the suit, and without the intervention of another legal adviser, dismissed with costs; there being no evidence of pressure or improper conduct on the part of the solicitor, and no evidence or averment of any specific error in the bill of costs; and it appearing

1856.
 ———
 BLAgrave
 v.
 ROUTH.
 ———
Statement.

The bill contained the following amongst other averments:—That the 2542*l.* 7*s.* 11*d.* was wholly made up of bills of costs, and such costs were incurred in the prosecution of certain suits in this Court, and such bills of costs have never been taxed, and were not delivered to the Plaintiff, or submitted to him, until long after the execution of the indenture of March, 1848; and no account, shewing how the full amount of the 2542*l.* 7*s.* 11*d.* was pretended by the Defendant to be made up, has ever been delivered to the Plaintiff; and the 2542*l.* 7*s.* 11*d.* expressed in the security of March, 1848, was professedly only an estimated sum. That the Plaintiff executed the several securities without further professional assistance than that of the Defendant, and was induced so to execute them, partly from the confidence he placed in the Defendant as his solicitor, which confidence he has since found was wholly abused, and partly under the pressure which the Defendant exercised over the Plaintiff, owing to the then embarrassed state of the Plaintiff's affairs. That the Defendant became the solicitor of the Plaintiff *Anthony Blagrove* in the year 1844, and continued without intermission to be such solicitor up to the month of August, 1852, and at the times when the several securities were severally prepared and executed. That the several securities were all prepared by the Defendant while he was the solicitor of the Plaintiff; and the same were not, nor was either of them, or any draft of either of them, submitted to or perused by any counsel, solicitor, or other professional adviser on the part of the Plaintiff and *Anthony Blagrove*, or either of them. That the Defendant brought the indenture of March, 1848, ready engrossed, to the residence of the Plaintiff in *Somersetshire*, for execution, and succeeded in obtaining the signature of the Plaintiff thereto by pressure. [As evidence of such pressure, the bill contained an averment, not supported by the evidence, that the Defendant prevented the Plaintiff from obtaining an annuity which he was negotiating to obtain from another client for the

Plaintiff, and which the bill averred to have been then of vital importance to the Plaintiff, owing to his embarrassed circumstances, until the mortgage of March, 1848, was executed.] That the whole of the sum purporting to form the consideration for the security of March, 1848, was for bills of costs, a large portion of which costs was unnecessarily and improperly incurred. That, by reason of the absence of dates in the accounts and bills of costs furnished by the Defendant to the Plaintiff, and by reason that no complete accounts or bills of costs have ever yet been furnished by the Defendant to the Plaintiff, and by reason that the accounts and bills of costs purporting to form the respective considerations for the said several securities are all interwoven, the Plaintiff is wholly unable to ascertain the amount properly due to the Defendant, or the full amount of the errors in the said accounts; and he submits, that the whole of such accounts ought to be made out in one continued series, with proper dates thereto; and that, for the reasons herein appearing, the Defendant ought to be compelled to verify the items in the same accounts, and that the Plaintiff ought to be at liberty to surcharge and falsify the same accounts. The Defendant pretends that a large portion of the consideration expressed in the indenture of March, 1848, was for moneys paid by the Defendant to one Mr. *Westmacott* for bills of costs due to him from the Plaintiff, and that such bills of costs ought not therefore to be taxed; whereas, the Plaintiff shews that Mr. *Westmacott* was the agent of the Defendant in carrying on Chancery business for the Defendant, and that all the said bills of costs were and are the Defendant's bills of costs.

The bill averred, that, in the year 1854, and in reference to the proceedings in a suit for foreclosure instituted by the Defendant against the Plaintiff in respect of the three securities other than that of March, 1848, the Plaintiff had

1856.
 BLAGRAVE
 v.
 ROUTH.
 Statement.

1856.
BLAGRAVE
v.
ROUTH.
Statement.

caused the accounts rendered to him by the Defendant of his receipts and payments on account of the Plaintiff and *Anthony Blagrove* to be investigated; and that it was thereupon discovered, and it was the fact, that such accounts were most irregularly made out, and that the balances thereby shewn were untrue.

The bill averred several specific instances of what it alleged to be erroneous and improper charges in the bills of costs, for the balance of which the last-mentioned securities were given; but it did not aver any specific instance of an erroneous or improper charge in the bills of costs for the amount of which the security of March, 1848, was given.

The bill contained other averments applicable exclusively to the securities other than that of March, 1848.

The bill prayed, that an account might be taken of the just and true considerations received by the Plaintiff from the Defendant for the said several securities; that, for the purpose of ascertaining such considerations, the Defendant might be directed, notwithstanding any settlement of accounts, and notwithstanding any agreement as to the amount due from the Plaintiff to the Defendant, to prove by evidence the actual sums advanced in respect of any items which might be disputed in the accounts; that the bills of costs forming the considerations of the securities, notwithstanding any agreement as to their amount, might be taxed; that the Plaintiff might be at liberty to surcharge and falsify the accounts; that all errors, as well those specified as those not specified, in the bill, and all sums which upon taxing the costs should be disallowed, might be deducted from the consideration expressed in the indenture of March, 1848; that the last-mentioned indenture might stand only as a security for such an amount as on taking the said accounts and taxing the said costs should, after deducting sums to

be allowed the Plaintiff as cash credits, be found to be fairly due from the Plaintiff to the Defendant, or, at any rate, that such indenture, when it should come into effect, might be declared to be a security for such sum only as should be found fairly due thereunder after the taxation of the said costs; and that, if necessary, a general account might be taken between the Plaintiff and the Defendant in respect of their money dealings and transactions.

1856.
BLAGRAVE
v.
ROUTH.
Statement.

The Defendant demurred. The demurrer was argued, and was allowed so far as it sought to set aside the securities other than that of March, 1848, chiefly on the ground that it appeared by the bill, that, by the decree made in the foreclosure suit instituted by the Defendant against the Plaintiff, those securities were established, and that the bill, in effect, sought to re-open the whole of that decree.

1854.
July 17th.

In reference to the security of March, 1848, it was in evidence that the Defendant, when that security was given, was acting as the Plaintiff's solicitor in suits then pending; that, before the Plaintiff executed that security, the Defendant submitted to him an estimate of what was then due to *Westmacott*, the Defendant's town agent in the Plaintiff's business, and to the Defendant himself in round sums, amounting together to the sum of 2542*l.* 7*s.* 11*d.*; that the latter sum was agreed to by the Plaintiff as an estimated charge, the Defendant undertaking to furnish him in the ensuing long Vacation with the bills of costs, by which that charge would be made out; that, upon this footing, the Plaintiff executed the indenture of March, 1848; that, in October, 1848, bills of costs were delivered by the Defendant pursuant to his undertaking; and that it appeared by such bills of costs that the estimate of *Westmacott's* bill exceeded the amount shewn by his bill of costs by a sum of 10*l.*, while, on the other hand, the Defendant's charges which had been estimated at 735*l.* 5*s.* 5*d.* were shewn by the bill of costs to have in fact amounted to 854*l.*

1856.
 {
 BLAUGRAVE
 n.
 ROUTH.
 —
Statement.

It was also in evidence, that, in August, 1852, the Plaintiff changed his solicitor; that, in December, 1852, the Plaintiff applied to the Court to have all papers, vouchers, and documents in the Defendant's possession relating to his affairs delivered up, and obtained an order for that purpose, and also for the taxation of all the Defendant's bills of costs except those included in the security of March, 1848; such order being made without prejudice to any question as to the Plaintiff's rights in respect of the costs for which the latter security was given.

By an affidavit filed after the time allowed for that purpose, the Plaintiff attempted to shew specific instances of erroneous charges, amounting in the whole to 30*l*.

The cause now came on to be heard.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Cottrell*, for the Plaintiff:—

The Defendant, when he obtained this security from the Plaintiff, was the Plaintiff's solicitor, acting as such in a suit then pending. The Plaintiff had no other legal adviser. No draft of the security was sent for the Plaintiff's approval, he saw nothing but the engrossed deed sent to him for execution; the sum secured was the alleged amount of bills of costs which had never been in any way submitted for his consideration; the Plaintiff was in embarrassed circumstances; and if the Defendant did not prevent his obtaining the annuity until the Plaintiff had executed the deed, he at least took advantage of the Plaintiff's embarrassed circumstances, and of the pendency of the Plaintiff's suit, to extort from him this security.

Actual pressure, according to Lord *Cottenham* in *Horlock*

v. Smith (a), is sufficient ground for re-opening any transaction of this nature between a solicitor and his client; and here, if the evidence does not amount to actual pressure, which we submit that it does, the circumstances are at least such that the Court must infer pressure. According to Sir *J. Leach* in *Howell v. Edmunds* (b), pressure will be inferred from the mere circumstance that the suit is pending, and a bill paid pending the suit will be re-opened.

1856.
BLAGRAVE
v.
ROUTH.
—
Argument.

It will be said, that the Plaintiff ought to have averred specific instances of errors in the accounts for the alleged amount of which this security was given; but that was not necessary. The authorities prove that a general charge is sufficient; and that, as between a solicitor and his client, the accounts of the former, though he may have securities, must be vouched, and the items in the account proved by receipts and evidence independently of the instruments: per Lord *St. Leonards* in *Lawless v. Mansfield* (c), where this is stated as the result of numerous authorities there examined.

Mr. *James*, Q. C., and Mr. *Cairns*, for the Defendant, were directed by the Vice-Chancellor to confine their defence to the proposition of law laid down by Lord *St. Leonards* in *Lawless v. Mansfield*.

They relied on the rule as laid down by Lord *Cottenham*, that there must be not only allegation but proof of such errors and improper charges in the bills of costs as amount to evidence of fraud: per Lord *Cottenham*, C., in *Waters v. Taylor* (d); and that general allegations are not sufficient. The Plaintiff must point out the specific items on which he means to rely,—must state and prove certain specific items in the accounts to have been grossly improper charges: *Horlock v.*

(a) 2 My. & Cr. 518.
(b) 4 Russ. 67.

(c) 1 Dr. & W. 611.
(d) 2 My. & Cr. 555.

1856.
 BLAGRAVE
 v.
 ROUTH.
 —
Argument.

Smith (a). [They cited also *Edwards v. Meyrick* (b), *In re Thompson* (c), *Stedman v. Collett* (d), and *In re Harries* (e).]

[The VICE-CHANCELLOR.—But for *Lawless v. Mansfield* I should not have entertained a doubt upon the point.]

That is not a decision of the Court of Chancery in *England*; and a decision of the Court in *Ireland*, if opposed to the authority of this Court, is not entitled to more weight than would belong to any foreign court.

If that rule were law, a client would have nothing to do but to make a general averment of improper charges, without specifying a single item answering that description, and would then be at liberty, at any distance of time, to surprise the Defendant with particulars which he had kept back, and which the Defendant could have no conception he would have to meet.

[The VICE-CHANCELLOR.—The Plaintiff cannot possibly ask more than an inquiry.]

But an inquiry would be the whole case. Besides, the Defendant has no materials for making out his case. He has delivered every voucher, every paper, to the Plaintiff.

Mr. Rolt, Q. C., in reply:—

The Defendant occupied a fiduciary position in relation to the Plaintiff when this security was given, and, as in cases between parents and children, and guardians and wards, having obtained a benefit while the relation lasted, the onus is upon him to shew that he gave full consideration.

(a) 2 My. & Cr. 495.
 (b) 2 Hare, 60.
 (c) 8 Beav. 237.

(d) 18 Jur. 457.
 (e) 13 M. & W. 3.

In such cases, the party impeaching the transaction cannot be charged with delay: *Baker v. Bradley* (a).

He relied on *Lawless v. Mansfield*.

[The VICE-CHANCELLOR.—It appears to me, that, if what you rely on in that case is law, it must follow that no solicitor can ever safely take a bond or mortgage from his client.]

It must follow that no solicitor can safely take such bond or mortgage until he has transferred his client to another legal adviser. But that is all that *Lawless v. Mansfield* requires. In *Horlock v. Smith* the suit was ended, the client dead, a new solicitor intervened. In such a case Lord *St. Leonards* would have concurred with Lord *Cottenham*, in holding the rule to be as there laid down by the latter Judge. Here, the security was taken pending the suit, and without the intervention of any other legal adviser.

1856.
BLAGRAVE
v.
ROUTH.
Argument

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I cannot regret that this case has been fully argued, and that I have twice had the advantage of hearing everything which it was possible to urge in support of the Plaintiff's claim. Some of the propositions laid down by Lord *St. Leonards*, as Lord Chancellor of *Ireland*, in *Lawless v. Mansfield* (b), were so broadly stated, and appeared so much at variance with what I had supposed to be the settled rule of this Court ever since Lord *Cottenham's* decision in *Waters v. Taylor* (c), decided some three or four years previously,—while at the same time they proceeded from a Judge of the highest possible eminence, who carefully con-

Judgment.

(a) 25 L. J., N. S., (Chanc.) 6.

(b) 1 Dr. & W. 557.

(c) 2 My. & Cr. 526

1856.
 ———
 BLAGRAVE
 v.
 ROUTH.
 ———
Judgment.

sidered the law he was laying down,—that I was anxious to have the principles of both decisions fully sifted and investigated. The result has been to confirm me in the conclusion, that there is a broad difference between the principles of the decisions to which I have referred. Having come to that conclusion, it is not competent to me to say which of the learned Judges I prefer to follow as an authority, since I am in fact bound by the authority of the one Judge, and I am not bound by that of the other.

The bill originally attempted to set aside four several securities. A demurrer was allowed with reference to three of those securities, and the only one now in question is that of March, 1848.

[The VICE-CHANCELLOR read the averments of the bill as stated, and in so doing took special notice of the circumstance that, notwithstanding it appeared by the bill that long before the bill was filed, and at a time when the Plaintiff was opposed to the Defendant in a suit of the most hostile nature, the Plaintiff had caused all the accounts rendered to him by the Defendant of his receipts and payments to be investigated, the bill did not aver a single specific instance of a fraudulent or improper charge in the bills of costs secured by the indenture of March, 1848, although it averred several of such instances in reference to the accounts for which the other securities were given.]

In reference to attempts of this nature to set aside securities given by a client to his solicitor, Lord *Cottenham* has laid down, with great clearness and precision, the ground on which all such attempts must rest. "The attempt," he says, in reference to that in *Waters v. Taylor*, "was not supported by that which alone could give it any title to success, viz. allegation and proof of such dealings between the solicitors and the client, or of such errors and improper charges

as could amount to evidence of fraud" (a). The Plaintiff must shew one of two things: either fraudulent dealing on the part of the solicitor in the concoction and obtaining of the security; or else error, amounting to evidence of fraud, in the charges which are made the foundation of the security. One or other of these two things the Plaintiff must allege *and prove*.

1856.
BLAGRAVE
v.
ROUTH.
—
Judgment.

In the present case, the Plaintiff has attempted to shew improper dealing employed by the Defendant in obtaining the security; but of fraud or error in the charges which were made the foundation of the security, there is not throughout the bill, notwithstanding many general allegations on the subject, any attempt to aver one single specific instance.

He has attempted, however, to shew improper dealing in obtaining the instrument. He says, first, the Defendant was his solicitor, acting as such in suits which were still pending when the security was given; secondly, that the Defendant obtained the security by actual pressure, which, it was argued, is a ground on which Lord *Cottenham* agreed with Sir *John Leach*, that a security would be re-opened; thirdly, he says, he had no other legal adviser when the security was obtained, no draft of it was sent for his approval, he saw nothing but the engrossment, and the amount was for bills of costs which had never been submitted in any way for his consideration.

As to the first point, it is admitted, that, when the security was given, the Defendant was acting as the Plaintiff's solicitor in suits then pending. But that circumstance, taken alone, is not a sufficient ground for re-opening the transaction.

As to the second point, the pressure, if any there was,

(a) 2 My. & Cr. 555.

1856.
 }
 BLAGRAVE
 v.
 ROUTE.
 —
Judgment.

was all exerted on the part of the Plaintiff. The Plaintiff, who of his own accord, and so far as the evidence shews without any instigation or encouragement on the part of the Defendant, was embarked in more than one Chancery suit, appears to have been unusually active, and to have derived unusual satisfaction from superintending the litigation he had in hand; and for some time previously, and up to the date of the security in question, his principal object appears to have been to have Mr. *Westmacott* removed from the management of his Chancery business, and the whole of that business transferred exclusively to the Defendant. While pressing the Defendant to effect this purpose, he was told by the latter that *Westmacott* would not part with the papers until he was paid his bill of costs; and that for this purpose it would be necessary to have a mortgage executed. The letter in which he is told this can bear no higher construction—yet that letter is the only fragment of evidence laid hold of as affording a ground for the charge of pressure exerted on the part of the Defendant. The allegation in the bill, that the Defendant prevented the Plaintiff from obtaining a certain annuity until the Plaintiff had secured him his bill of costs, is utterly without proof.

It was argued, in reference to a considerable advantage given to the Plaintiff under this security, that, if such advantage is to be regarded by the Court, a solicitor may easily escape the consequences of any improper transaction by giving some interest to his client. But I am at least at liberty to take such advantage into consideration in reference to the question of undue pressure. Here, so far from exerting any pressure on the Plaintiff, the Defendant was in fact allowing him a most unusual indulgence. One of the principal grounds for the profits allowed in a solicitor's bill, which appear considerable when viewed in the abstract, is the large amount of money out of pocket expended in carrying on a heavy business for his client. The De-

fendant, nevertheless, by this indenture, consents to forego his right to sue the Plaintiff for his bill of costs so long as Colonel *Blagrove* lives, and, during that time, contents himself with simple interest.

1856.
BLAGROVE
v.
ROUTH.
Judgment.

As to the third point, there would be a great deal to say in this case, if it appeared in evidence that the Defendant, a solicitor, in taking from his client this security, was in fact taking a security for a sum including the alleged amount of untaxed bills, as to which no communication had passed between himself and his client, nor any arrangement been entered into as to the delivery of bills of costs, by which that amount would be shewn to be due. But that was not the case. It is clear from the evidence, (the bill is silent upon the whole matter), that, before the Plaintiff executed the security in question, the Defendant submitted to him an estimate of what was then due to *Westmacott* and to himself, in round sums amounting together to the sum of 2542*l.* 7*s.* 11*d.* It is clear that this sum of 2542*l.* 7*s.* 11*d.* was agreed to by the Plaintiff as an estimated charge, the Defendant undertaking to furnish him in the long Vacation with the bills of costs by which that charge would be made out:—bills of costs, for which the Plaintiff's eagerness to transfer his business from *Westmacott* to *Routh*, and with that view to have the security executed at once, prevented him from waiting. It is clear, that it was upon this footing that the Plaintiff executed the security; and that, in October, 1848, the bills were delivered by the Defendant pursuant to his undertaking.

Such being the footing upon which the security was executed, if the bills so delivered by the Defendant had amounted in the whole to a sum less than the estimated sum for which the security was given, then the Plaintiff, (assuming him to have put the whole case fairly and openly upon his bill, instead of waiting, as he has done, to take

1856.
 BLAGRAVE
 v.
 ROUTH.
 —
Judgment.

the chance of being able at the hearing to produce some evidence which the Defendant might not be able to answer), might have had the same relief as in *Coleman v. Mellersh* (a). In that case there had been an estimate made of the bills, and a security taken for the amount of the estimate, and the amount of the bills fell short of the amount of the estimate by 60*l.* And the Lord Chancellor said, that, as the Defendant had represented the bill at 60*l.* more than the actual amount, the very foundation of the mortgage failed, and the whole transaction must be re-opened. But the present case is the very reverse of *Coleman v. Mellersh*, with the exception of 10*l.*—a sum too trifling to notice,—the estimate of Mr. *Westmacott's* bill appears to have been correct; while the Defendant's charges, estimated at 735*l.* 5*s.* 5*d.*, are shewn by the bills to have in fact amounted to 854*l.*

I have now examined all the evidence by which the Plaintiff has attempted to shew improper dealing employed by the Defendant in obtaining the security, and I have found that such evidence entirely fails. That disposes of the first ground, upon which, according to Lord *Cottenham*, attempts of this nature must be supported. And as to the second ground, I have already observed, that, throughout the whole of the Plaintiff's bill, there does not appear to be an attempt to aver one single specific instance of fraud or error in the charges which were made the foundation of the security in question. It remains to consider what is the rule of law as to the right of a client to have a security set aside under such circumstances.

It is clear, that, where specific errors, amounting to evidence of fraud in the charges which were made the foundation of the security, are alleged and proved, the Plaintiff is entitled to have the security set aside. But the proposition

(a) 2 M'N. & G. 309.

laid down by Lord *St. Leonards* in *Lawless v. Mansfield* goes a great deal further. He begins by stating the question. He says: "The question which has been most discussed in this case is, what should be the frame of a bill like the present cross bill, in which the transactions between a solicitor and his client are impeached as fraudulent, and accounts which were settled, and for which securities had been given, are sought to be opened? To what extent charges, shewing specific errors in those accounts, ought to be inserted, in order to open the accounts generally; and what is the liability of a solicitor to prove the items of his account, irrespective of the bonds or bills or securities of that sort which he has taken? I shall inquire what the rule of the Court is before I enter upon the consideration of the items alleged to be erroneous."—(I should mention that, in *Lawless v. Mansfield*, there was one item in one of the accounts alleged and proved to be improper; but the argument was, that, as to the other accounts, there was nothing alleged and proved). "In ordinary cases, the rule seems to be, that the establishment of one mistake is sufficient to induce the Court to give a decree entitling the party to surcharge and falsify an account. That appears to have been admitted in *Davis v. Spurling*, which has been so much referred to throughout the argument. The report of that case is not very full, neither does it appear quite distinctly whether there were several accounts or but one. I therefore do not rely on the dicta there as going at all beyond the common rule, which, as I have already stated, is the right to a decree to surcharge and falsify, where an error in an account is alleged and proved. Whether, in ordinary cases, where there are several distinct accounts, and errors are alleged and proved only in some of them, all are liable to be surcharged and falsified, does not appear to have been decided. Lord *Eldon*, in *Chambers v. Goldwin*, distinctly affirms the principle, that, in ordinary cases, an error must be charged in the pleadings,

1856.
 BLAGRAVE
 v.
 ROUTH.
 Judgment.

1856.
 ———
 BLAUGRAVE
 v.
 ROUTH.
 ———
Judgment.

and proved at the hearing, to entitle the party to have liberty to surcharge and falsify" (a). Then, after going through several cases upon that head, Lord *St. Leonards* says further: "No doubt the rule of this Court would, in an ordinary case of a settled account, preclude the party from the relief which is here sought; but this is not the ordinary case; it is plainly distinguishable from it, and that on the ground that the accounts here are between parties who stood in the relation of solicitor and client, of agent and principal, of creditor and debtor; for Mr. *Lawless* stood in the relation of those three characters to the Messrs. *Mansfield* at the time the accounts were settled. Now, I take it that these two propositions are perfectly clear in law: first, that, where the relation of attorney and client subsists, in questions of accounts between the parties, the common rule does not prevail; though the party only alleges generally, that the accounts are erroneous, the Court will make a decree opening the accounts, if sufficient cause is shewn; and, secondly, that a solicitor, to whom his client has given bonds or bills, cannot produce those securities and say, as a third person might, they prove the existence of his debt; but from the relationship in which the parties stood, and the alarm of this Court, lest by means of such relationship any undue influence should have been exerted, the solicitor is bound, irrespective of his securities, to prove the debt for which those securities were given. This latter position has been disputed, but it is now perfectly settled" (b). Then he proceeds to say, that he founds this opinion deliberately, having had occasion to consider all the authorities when he argued the case of *Morgan v. Lewes* (c) before the House of Lords, and adds, "That case, as to the pleadings, was a simple one; it was heard originally upon bill and answer; there was no proof of the errors specified in the bill, and the Defendant did, in his an-

(a) 1 Dr. & W. 603, 604.

(b) Id. 605, 606.

(c) S.C. (nom. *Morgan v. Evans*)
 1 Cl. & F. 159; 8 Bligh, 777.

swer, rely upon a settled account. The first decree was the ordinary one directing a general account. The case appears in several Reports;” and he then goes through the opinions of all the Judges, to shew that they established in his mind the law of the Court to be, that a general charge, like that in the case before him, was sufficient; and that, as between a solicitor and his client, his accounts, though he may have securities, must be vouched, and the items in the account proved by receipts and evidence independently of the instruments (a).

1856.
BLAGRAVE
v.
ROUTH.
Judgment.

I was surprised to find that proposition, because it seems so entirely in conflict with the principle laid down by Lord Cottenham in *Waters v. Taylor*. In *Waters v. Taylor* the security was a security for costs, amounting altogether to 5000*l.*, given while the suit was going on—taken by the solicitor from the client, (although it is true there was considerable delay in the case in attempting to dispute them), yet Lord Cottenham lays down this proposition most clearly: He says (b): “The case indeed,” of *Waters v. Taylor*, “differs from that of *Horlock v. Smith* (c) in this—that the security was taken whilst the suits were depending.” (Mr. Rolt, in reply, called my attention to *Horlock v. Smith*, and distinguished that from the other cases, upon the ground that in that case there was no suit pending, and the securities were at an end. In *Waters v. Taylor* the security was taken, as here, whilst the suit was pending), “and while the relation of solicitor and client continued. But so it was in *Cooke v. Setree* (d); and in *Plenderleath v. Fraser* (e), and *Gretton v. Leyburne* (f), the relation of attorney and client continued at the time of the settlement. No doubt, the settlement or payment of a solicitor’s bills pending a suit, and whilst the relation continues, affords grounds upon which the account will be much

(a) 1 Dr. & W. 611.

(b) 2 My. & Cr. 556.

(c) Id. 495.

(d) 1 V. & B. 126.

(e) 3 V. & B. 174.

(f) T. & R. 407.

1856.
 ———
 BLAGRAVE
 v.
 ROUTH.
 ———
Judgment.

more easily opened, and the bills referred for taxation, than in other cases; but if these circumstances alone were, in all cases, to be held sufficient ground for a taxation, no solicitor who continues to act for a client would be secure of any settlement during the life of his client; and the continuance of one of those suits which not unfrequently occur in this Court, would prevent the possibility of any settlement between the solicitor and the client." Fortunately, suits now do not often occur, and are not likely to occur, of such length as Lord *Cottenham* alludes to. The Plaintiff, although he has been involved in five Chancery suits, has disposed of them in comparatively a short space of time. But he was involved in litigation, in which nobody could expect the Defendant to make a large advance, or pledge himself to make further advances, without any settlement or security whatever. And what the Defendant in effect did was this:—having a client utterly insolvent except as to this reversionary interest, he consented to postpone his claim for interest when about to make a large advance on his client's behalf.

Such was the doctrine of Lord *Cottenham* in *Waters v. Taylor*:—a doctrine extremely different from that laid down by Lord *St. Leonards*, who says, that the simple averment of erroneous accounts is enough in the case of a solicitor and client to open the whole, and that thereupon the solicitor must prove the amount of the debt.

I have looked carefully to Lord *St. Leonards*' later view of *Morgan v. Lewes* in his "Treatise of the Law of Property as administered by the House of Lords" (a). The edition I have before me was published in 1849, two years later than the decision in *Lawless v. Mansfield*, and *Lawless v. Mansfield* is referred to in a note on the case of *Morgan v.*

(a) Page 576.

Lewes. Lord *St. Leonards* there says: "In the case of *Morgan v. Lewes*, which it is impossible to refer to without regretting that the litigation had not been stopped at an earlier period, it was held, that *Morgan*, having taken securities from *Lewes*, whose adviser, solicitor, and agent he was, for various sums of money, was bound to prove the advances by other evidence than the securities themselves or the accounts, and also that an attorney and agent is bound to keep regular accounts. The first rule" (namely, of his being bound to prove the advances without any impeachment of them) "was laid down generally, but in other passages it was qualified. Lord *Redesdale* said, that the settled accounts confuted themselves, so that they could not presume that any sums were advanced except such as appeared to have been so by receipts and evidence independent of the instruments; and Lord *Eldon* concluded by repeating that the record appeared to him to open and establish this principle,—that where an attorney takes it upon him to take securities from his client *which do not express the real nature of the transaction*," (the italics are not mine but Lord *St. Leonards*'), "it is incumbent on him, by other evidence than the securities themselves, to prove what was the real nature of the transaction, and what sums were really advanced."

1856.
BLAGRAVE
v.
ROUTH.
Judgment.

I conceive that the words marked with italics were meant to designate, not securities which do not express upon the face of them that they are given for bills of costs, but securities which falsely suggest that which was not the real nature of the transaction. The first proposition would go a great deal too far. The last does not apply to the present case. In this security I find a recital that the amount secured was due; and when the bills of costs are produced I find that they make up that amount and 100*l.* more: and that being so, I apprehend

1856.
 BLAGRAVE
 v.
 ROUTH.
 —
Judgment.

that the security does express the real nature of the transaction, so far as it is required to do so by any rule of this Court. In *Waters v. Taylor* the recital was simply that so much money was due, no mention being made of bills of costs. And there Lord *Cottenham* laid down what I apprehend to be the true rule of this Court, viz. that, in the case of a solicitor, if, in seeking to set aside a security given him by his client, the Plaintiff relies on pressure, undue influence, or other improper conduct employed by him in obtaining the security, slighter evidence may be held sufficient than would be required in the case of a mere stranger; but the Plaintiff, nevertheless, must aver and prove the improper conduct on which he so relies; and, in like manner, if he relies on fraud, or error amounting to evidence of fraud, in the bill of costs in respect of which the security was given, he must aver and prove the specific items upon which he means to rely to be fraudulent or erroneous.

In the present case, as I have observed more than once already, I do not find throughout the whole of the Plaintiff's bill one single specific item of the bill of costs averred to be either fraudulent or erroneous. So far as regards the charges in his bill of costs, there is nothing which the Defendant comes here to meet; and if I am to apply Lord *Cottenham's* doctrine to any case, I am certainly to apply it to this, for I think there never was a case so circumstanced, and in which, if I re-opened the accounts, I should be dealing so unfairly with the Defendant. Here, the Plaintiff has given a security for an estimated amount, agreed by him to be due, upon the understanding that the Defendant should deliver the bills of costs by a given time. Those bills are delivered in October, 1848, and within the given period. In August, 1852, the Plaintiff changes his solicitor. In December, 1852, he applies to this Court to have all the papers, vouchers, and documents in the Defendant's possession re-

lating to his affairs delivered up to him. He obtains an order for that purpose, and also for the taxation of all the Defendant's bills of costs, except those included in the security now in question, and he obtains that order without prejudice to any question as to his rights in respect of the costs for which that security was given. How far that order left it open to him to assert his rights, as he attempts to assert them in the present suit, it is unnecessary to determine. It is clear that the least which could be expected of a person in the Plaintiff's then position was, that, having obtained such an order, and having procured the vouchers and documents relating to the bills of costs which he now disputes, he should as speedily as possible assert his right to have such costs taxed. Failing to do this, he would certainly leave the Court to infer, that, having the benefit of a security which relieved him from the liability of being charged with compound interest, he had determined to acquiesce in that security. He cannot be heard to say he was at liberty, in the position he occupied, to stand by as long as he pleased without asserting his rights. But the case does not stand there—a year and a-half before this bill was filed he took upon himself the investigation of these accounts. If an exception is ever to be made, which I hope it will not, to the rule that a Plaintiff must aver and prove the errors on which he relies, certainly that exception is not to be made in favour of one who has had the bills of costs in his possession for nearly eight years, who has been at arms length with his solicitor for nearly four years, who admits that he investigated the bills of costs in a hostile suit in this Court a year and a half since, and yet brings his cause on to a hearing without an averment of a single error, and then by affidavits filed at the last moment, when it is too late for the Defendant to answer them, attempts to raise a charge of mistakes and misapprehensions. What equity can there be to relieve a party under such circumstances? What equity

1856.
BLAGRAVE
v.
ROUTH.
Judgment.

1856.
 BLAGRAVE
 v.
 ROUTH.
 —
Judgment.

can there be to allow (which is all that I could with any shadow of reason have been asked to allow) an inquiry whether accounts are correct, of which the Plaintiff ought at least to have taken the pains to point out the incorrectness—an inquiry which, as Lord *Cottenham* expressed it, would be in effect deciding the whole case?

It would still have been unsatisfactory to part with a case involving charges like the present, if it were possible to imagine that imposition of any kind had been really practised upon the Plaintiff. But the Court is relieved from any uneasiness on that score by the affidavits themselves. The utmost they make out is an overcharge of sums amounting to about 30*l.* That circumstance unexplained would doubtless be unsatisfactory. But I am bound to bear in mind that the Defendant has had no opportunity of explaining that circumstance; and on the part of the Defendant I have this broad fact, that the amount of the bills, as estimated, is less by upwards of 100*l.* than the amount shewn to be due by the bills as delivered; and though I do not mean to lay down such a doctrine as that an improper charge may be made matter of set-off, yet a comparison of these two sums does prove to me that the true reason why the Plaintiff never relied before upon any of the statements now first put forth by his affidavits, was, that he felt the uselessness of the attempt; he was conscious, that, in the Taxing Master's office, he would never strike off so much as was omitted in the sum for which he executed the security.

That is the obvious conclusion; and I confess I never saw a case so unfairly presented to the Court as the present has been on the part of the Plaintiff, relying as it would seem upon the authority of the doctrine in *Lawless v. Mansfield*. I certainly cannot entertain any such doctrine as that on which he relies. I consider myself bound by Lord *Cot-*

tenham's decision, to hold that it is not the law of this Court.

1856.
BLAGRAVE
v.
ROUTH.
—
Judgment.

The bill offers no redemption. It simply attempts to set aside the security: and all that I can do is to dismiss the fragment which the demurrer has left, with costs.

Decreed accordingly.

LEE v. HOWLETT.

March 11th.

TIMOTHY TRIPP LEE, by his will, dated the 30th of June, 1840, amongst other devises, gave to his wife *Elizabeth* (since deceased) certain freehold and leasehold hereditaments, known as *Dell's Manor* farm, To hold the same for her life; and, after her decease, the testator directed that the same should be sold by public auction, and that the money should be equally divided among his *surviving* children; and the testator devised and bequeathed the residue of his property, as well funded or otherwise, to his wife for her life, and after her death, to be equally divided amongst his *surviving* children. And he appointed his wife, and his sons, the Plaintiff *Timothy Lee* and *Cornelius Lee* (since deceased), executrix and executors of his will.

*Mortgages—
Notice—Equitable Interest
in Real Estate
—Chose in Action—Priority.*

A subsequent mortgagee of an equitable interest in a share of residuary real estate, without notice of the prior mortgage, does not obtain priority over the former mortgagee, by first giving notice of his security to the trustee in whom the legal estate is vested; notwithstanding, that, by a deed of arrangement, made previously to the mortgages, between the

The testator died on the 29th of December, 1840, leaving his widow and eleven children surviving him.

By a deed of arrangement, dated in 1841, and executed by all the children, (except one who had died), it was mutually agreed that all the property devised by the testator

mortgagor and the other persons interested in the real estate, their interests were treated as personal estate.

But it is otherwise if the estate is vested in the trustee by a devise to him in trust to sell and to divide the proceeds among several persons, of whom the mortgagor is one, and the mortgages are of the mortgagor's share in such proceeds; because then, although the mortgages may have been made before any sale took place, the subject of them could only, as regarded the mortgagor's interest therein, be considered a chose in action.

1856.
 {
 LEE
 v.
 HOWLETT.
 —
 Statement.

amongst his *surviving* children, should be divided and disposed of, subject to the life interests therein, in like manner and shares as if the same had been given, subject as aforesaid, amongst all his children who should survive him, equally, as tenants in common, so that one equal eleventh part or share thereof should go and be paid and payable to each and every, or to the *executors, administrators, or assigns* of each and every, the said &c. (the children), notwithstanding any or either of them the said &c. should die before the property should become divisible or payable, and the *executors or administrators* of any of them who might so die should receive his or her eleventh share, and apply the same as *his or her personal estate &c.*

Charles Lee, one of the children, by indenture, dated the 24th of March, 1842, mortgaged his reversionary share and interest of all the property under the will and deed of arrangement to one *Simon Main*, to secure 450*l.* and interest, of which indenture the Plaintiff *Timothy Lee* had not received notice till the year 1848.

By indenture, dated February 14th, 1844, *Charles Lee* again assigned his share to a Miss *Lys* to secure 250*l.* and interest; of which indenture Miss *Lys* gave notice to the Plaintiff in May, 1844.

At the time of the mortgage to her, Miss *Lys* had no notice of the prior mortgage.

By indenture, dated the 1st of October, 1846, *Charles Lee* again assigned his share to one *Gaches*, to secure a sum of 300*l.* and interest; of which indenture *Gaches* gave notice to the Plaintiff in the same month of October, 1846.

The testator's widow having died in 1854, this suit was instituted by the Plaintiff for the administration of the real estate; a previous suit of "*Lys v. Lee*" had been instituted

by Miss *Lys* to realise her security out of the personal estate, which however was wholly exhausted, leaving nothing but the real estate and its produce for the incumbrancers to look to.

1856.
 {
 LEE
 v.
 HOWLETT.
 —
Statement.

A decree for sale had been made in this suit (*Lee v. Howlett*), and the usual inquiry directed as to incumbrances on the shares of the children.

Pursuant to the decree *Dell's Manor* farm had been sold for 3400*l.*, and the residuary estate for 500*l.* The Chief Clerk certified as to the incumbrances, and, amongst others, to those on *Charles Lee's* share as above; the result of his finding being, that the several mortgagees, *Vaughan* (in whom *Simon Main's* mortgage had become vested), Miss *Lys*, and *Gaches*, were entitled according to the dates of their incumbrances. But it was arranged that the question of priority, with reference to the dates of the several notices given to the Plaintiff, should be argued before the Court on the hearing for further consideration.

The cause now came on to be so heard.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the Plaintiff

Argument.

M. *Daniel*, Q. C., and Mr. *W. P. Murray*, for Miss *Lys*.

The notice of the mortgage to Miss *Lys* which was given to the Plaintiff, gave that mortgage priority over the other mortgage previously made, but of which no notice had been given. It is true that the mortgagee of an equitable interest in land cannot obtain priority by giving notice to the trustee, because this doctrine of notice does not apply to real estate: *Jones v. Jones* (a), *Wilmot v. Pike* (b), *Malcolm v.*

(a) 8 Sim. 633.

(b) 5 Hare, 14.

1856.
 {
 LEE
 v.
 HOWLETT.
 —
Argument.

Charlesworth(a), and this even when the mortgage is of an equitable interest in leaseholds for years: *Wiltshire v. Rabbits* (b). But, in this case, the *Dell's Manor* farm was devised in trust for sale, and only a share in the proceeds of such sale was given to the mortgagor, and the residuary real estate, though not devised in trust for sale, was treated as personal estate by the deed of arrangement; and therefore, as to him and his mortgagees, the property must be considered as personal estate: *Phillips v. Phillips*(c); and that being so, the notice given by Miss *Lys* gave her priority: *Dearle v. Hall*(d). The very point was so decided in *Foster v. Cockerell* (e), *S.C.* nom. *Foster v. Blackstone* (f).

Mr. *Bilton* for other parties.

Mr. *Cadman Jones* for *Vaughan*, the first mortgagee:—

The mortgages must take effect in the order in which they were made.—He relied on *Wiltshire v. Rabbits* (b), and on the fact that the property was not sold till after the mortgages were made, and that no sale could have been made at the time when the mortgages were executed. He cited also *Rooper v. Harrison* (g).

Judgment. VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am of opinion, that as to that portion of the property which was ordered to be sold, I am bound to hold, on the principle of *Foster v. Cockerell* (e), *Dearle v. Hall* (d) and that class of cases, that the incumbrancer who first gave notice of his incumbrance must prevail over the others. The principle does not depend simply on a question of mala

(a) 1 Keen, 63.
 (b) 14 Sim. 76.
 (c) 1 My. & K. 649.
 (d) 3 Russ. 1.

(e) 9 Bligh., N. S., 332; 3 CL & F. 456.
 (f) 1 My. & K. 297.
 (g) 2 Kay & J. 86.

fides; but the rule is, that the party who first makes himself master of a chose in action, by giving notice, to prevent its being handed over by the person in whose hands it is to any other claimant,—in other words, who first divests the title of the owner by giving notice to the person through whom the owner must derive the fund—arrests that fund, and acquires the property for himself. Whether the fund be a trust fund held by *A.* in trust for *B.*, or a debt payable by *A.* to *B.*, if *B.* assigns, and his assign requires *A.* to pay the money over to him, that gives him priority over a previous assign of *B.*, who has not given such notice.

1856.
 LEE
 v.
 HOWLETT.
 Judgment.

It is decided, that this doctrine does not apply to real estate; and in *Wiltshire v. Rabbits*(a) the late Vice-Chancellor of *England* considered that the doctrine was not applicable to an assignment of an equitable interest in a chattel real. In this case, part of the property is directed to be sold, without saying by whom. The sale must be by the heir or executors. Here, the same person fills both those characters, and the property must therefore pass through him. It must be converted into money, and none of the legatees could have reached that money except through him; and they could never have had the property in the shape of land, but only as money. Then, the executor being bound to pay the shares in this manner, the fact, that, at the time when this security was given, the period for the sale had not arrived, is not material. Whenever the property was sold, and the money paid to the executor, he would hold part of it for *Charles Lee*, or for the person who had obtained an assignment of his share from *Charles Lee*. Here, *Miss Lys* first gave to the executor notice of the assignment in her favour, and therefore she has priority over all other assigns of *Charles Lee's* share as to this part of the mortgaged property.

As regards the residuary real estate, there is no direction in the will to sell that. It was devised to the testator's wife for life, and after her death to her children. That would

(a) 14 Sim. 76.

1856.
 }
 LEE
 v.
 HOWLETT.
 —
Judgment.

carry the fee simple, and the children would not be obliged to take their shares from the hands of any third person; and although, by the deed of arrangement, they seem to have treated it as personal estate, it was in their own hands; and therefore there can be no question of notice as to this property, but it must go to the incumbrancers according to the order in time in which they obtained their securities.

Feb. 21st &
 22nd.

MATHER v. FRASER.

*Mortgage—
 Fixtures—
 Trade—Bank-
 ruptcy—*17 & 18 Vict. c. 37.

BY an indenture, dated the 23rd of August, 1854, between John Barton and George Barton, described as "both of the

Mortgage by two, described in the deed as copper roller manufacturers, reciting a conveyance to them of land, and mills or factories, in a manufacturing town, as tenants in common in fee, and that they were carrying on business at the said mills or factories as copper roller manufacturers, and in such capacity had lately affixed to or placed upon the land, mills, or factories, a steam engine and boilers, together with a large quantity of mill-gear and millwright work, and granting the land, mills, or factories, and hereditaments comprised in the recited conveyance, to the use of the Plaintiffs in fee, subject to a proviso for redemption:—*Held*, as between the Plaintiffs and the mortgagor's assignees in bankruptcy,—

First, that, assuming it possible to distinguish between the case of machinery placed upon land for the purpose of trade or manufacture as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the purpose of better and more profitably enjoying the land (as to which *quære*), the recitals shewed that this was a case of the latter description; and although the means of the proposed use and enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would have descended to the heir along with and as part of the soil itself.

Secondly, that the mere grant of the land, following upon the preceding recitals, was sufficient to pass all articles so fixed, and that a subsequent enumeration of certain of such articles did not rebut the inference that all articles so fixed passed by the mere grant of the land, as forming part of the freehold.

And, *semble*, that the same result would have attended an assignment of the land, had the mortgagors been mere termors.

Examination of the authorities upon this subject, and a dictum in *Hellawell v. Eastwood* (6 Exch. 313) observed upon. The principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil.

Thirdly, that the mortgage, although it comprised all fixtures then or thereafter to be placed on the land, and contained a covenant not to remove any of the particulars granted by the mortgage without the permission of the mortgagees, was not an act of bankruptcy, it appearing that the mortgagors had other property, that the mortgage-money was actually advanced, and that the transaction was clear of fraud.

Fourthly, that, the fixtures passing by the grant of the land, the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 37) could have no application.

Fifthly, articles standing merely by their own weight are not "fixtures."

But where part of a machine is a fixture, and another and essential part of it is moveable, the latter also will be held "a fixture."

city of *Manchester*, copper roller manufacturers," of the one part, and the Plaintiffs of the other part, reciting, that, by an indenture, dated 1850, certain plots of land in *Broughton* in *Lancashire*, and the mills or factories, dwelling-houses, erections, and buildings then standing thereon, were conveyed and assured to the use of *John Barton* and *George Barton*, as tenants in common in fee; and reciting, that *John Barton* and *George Barton* were carrying on business at the said mills or factories as copper roller manufacturers, and, in such capacity, had lately affixed to or placed upon, in, or about the said plots of land, mills, or factories, and hereditaments, a steam engine and boilers, together with a large quantity of mill-gear and millwright work,—in consideration of the sum of 7000*l.* therein mentioned to have been paid to *John Barton* and *George Barton* by the Plaintiffs, *John Barton* and *George Barton* granted, released, and conveyed unto the Plaintiffs, their heirs and assigns, the said plots of land, mills, or factories, dwelling-houses, and hereditaments comprised in the indenture of 1850, and then in the occupation of the said *John Barton* and *George Barton*; and also all and singular the steam engine, steam boilers, mill-gear, millwright work, and machinery, then or thereafter to be fixed to the said lands, hereditaments, and premises, or any of them, or any part thereof, together with all houses, outhouses, edifices, fixtures, buildings, yards, paths, passages, privileges, easements, rights, members, and appurtenances to the said plots of land, mills, or factories, dwelling-houses, erections, and buildings, or any of them, or any part thereof, belonging, or in any-wise appertaining, To hold the same to the use of the Plaintiffs, their heirs and assigns, subject to a proviso for redemption on payment of the sum of 7000*l.*, with interest at 5*l.* per cent. per annum, on the 23rd of February then next. The indenture contained a covenant by the *Bartons* not to pull down, remove, or take away the said mills or factories, dwelling-houses, erections, or buildings, steam engine, boil-

1856.
 MATHER
 v.
 FRASER.
 Statement.

1856.
 {
 MATHER
 v.
 FRASER.
 —
Statement.

ers, mill-gear, millwright work, or premises thereinbefore granted, or any of them, or any part or parts thereof, without the permission in writing of the Plaintiffs or the survivor of them, &c., unless in cases where such pulling down, removal, or taking away should be to a small extent, and should be rendered necessary by any of the premises being worn out or injured. It also contained a proviso that the *Bartons* should not be at liberty, without the consent of the Plaintiffs, to repay the 7000*l.*, or any part thereof, for seven years from the date of the indenture.

On the 23rd of May, 1855, the *Bartons* were adjudicated bankrupts.

The bill was filed against the assignees in bankruptcy, who had advertised for sale all the machinery upon the lands comprised in the mortgage, praying for the usual foreclosure decree, and for an interim injunction, which was granted by an order of the 10th of December, 1855.

The Defendants, by their answer, submitted, first, that machinery and other articles connected with the working of the mills, although attached to the freehold, did not pass by the mortgage. Secondly, that, if such articles did pass, the mortgage was an act of bankruptcy on the part of the *Bartons*. Thirdly, that, even if otherwise operative, the mortgage, not having been registered under the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 36), was by that Act rendered null and void as regarded all fixtures. And, fourthly, that the Plaintiffs lost their title to such property by leaving it in the order and disposition of the bankrupts.

No discussion of importance arose as to what particular articles fell within the denomination of "fixtures," except in reference to one machine, a description of which will be found at the close of the judgment.

It appeared, that, at the date of the mortgage, the *Bartons* had other property of considerable value at *Manchester* and elsewhere, which was not comprised in the mortgage; also, that they endeavoured to stipulate for liberty to pay off the mortgage-debt within the seven years; but this proposal was not acceded to by the Plaintiffs.

1856.
MATHER
v.
FRASER.
Statement.

The value of the fixtures in dispute exceeded that of the land comprised in the mortgage.

Mr. *Rolt*, Q. C., and Mr. *De Gex*, for the Plaintiffs, now moved for a decree.

Argument.

First, the Plaintiffs are entitled to a declaration that all the articles in question passed by the mortgage of August, 1854.

All such articles are annexed to the soil, or form essential parts of machines which are so annexed; and, at the date of the mortgage, the mortgagors were owners not only of the articles in question, but also of the inheritance in fee simple of the soil. Such fixtures, therefore, whether annexed to the soil for purposes of trade or manufacture, or otherwise, were in the nature of real estate, and passed with the soil to which they were annexed. They would have passed to the heir and not to the executor: *Fisher v. Dixon* (a); a fortiori, therefore, would they pass to a purchaser for value. The circumstance that the owner of the fixture is owner also of the fee simple of the land to which it is affixed, is all important. Introduce that element, and the case is removed at once out of reach of the entire class of authorities in which the old rule of law has been relaxed for the encouragement of trade, the principle of that relaxation presupposing a tenant

(a) 12 Cl. & F. 312.

1856.
 MATHER
 v
 FRASER.
 —
Argument.

whose trade is to be encouraged, by holding fixtures to be his property, as against the freeholder of the soil to which they are affixed. Here, no tenant intervenes, and there is nothing to relax the rule of law which treats fixtures as part of the soil, and as passing with it whether by descent or purchase. The fixtures in question would have passed to the Plaintiffs by a mere grant of the soil: *Lawton v. Salmon* (a), *Colegrave v. Dias Santos* (b), *Gordon v. Falkner* (c), *Longstaffe v. Meagoe* (d), *Wiltshear v. Cottrell* (e), *Rufford v. Bishopp* (f).

Secondly, this was not an act of bankruptcy, although the fixtures passed: for, first, there was other property to which the mortgagors were entitled at the date of the mortgage, and which the mortgage did not comprise; secondly, the 7000*l.* advanced upon the security of the mortgage was intended to go, and did go, into the business: *Baxter v. Pritchard* (g).

Thirdly, the objection on the point of order and disposition is disposed of by *Ex parte Barclay* (h), where the mortgagor was merely tenant for a term of years. Here, as there, the creditors were bound to take notice that the land was or might be mortgaged. If the land was mortgaged, the presumption was, that all was mortgaged which would pass by a conveyance of the land; therefore, that the fixtures were mortgaged: and if the fixtures were mortgaged, the subsequent possession of them by the bankrupt was not a possession of them as goods and chattels, but as part of the land: Lord Cranworth in *Ex parte Barclay* (i). This distinguishes the present case from *Trappes v. Harter* (k),

(a) 1 H. Bla. 259, n.

(b) 2 B. & C. 76.

(c) 4 T. R. 565.

(d) 2 Ad. & E. 167.

(e) 1 E. & B. 674.

(f) 5 Russ. 346.

(g) 1 Ad. & E. 456.

(h) 5 De G. M. & G. 403, 411, 412, 415.

(i) Id. 411, 412.

(k) 2 Cr. & Mee. 153.

where the mortgage did not, either expressly or by implication, include the fixtures, which remained the property of the bankrupt, and therefore passed to the assignees: Lord *Cranworth* in *Ex parte Barclay* (a).

1856.
MATHES
v.
FRASER.
Argument.

Fourthly, the objection, that the deed was not registered under the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 36), is answered by the same reasoning as that upon the point of order and disposition; for the Act does not apply to fixtures which are not in the order and disposition of the bankrupt. Compare the preamble of the Act with Lord *Redesdale's* observations in *Joy v. Campbell* (b). A mortgage of the inheritance, passing the fixtures as part of the inheritance, is not a bill of sale, not a mortgage of a chattel: and that being so, the Act does not apply.

Mr. *Daniel*, Q. C., and Mr. *Little*, for the Defendants:—

First, the articles in question did not pass by the deed.

All such articles were things placed upon the soil by the mortgagors, not for the benefit of the inheritance, not as accessaries to the enjoyment of the inheritance, but in the course of their trade, and as accessaries to the carrying on of their trade; as is clear from the deed in which the mortgagors are described at the commencement as copper roller manufacturers, and are recited as having, "in that capacity," placed the articles in question upon the land. All such articles must, therefore, fall within that principle of law which, in favour of trade, treats such articles as personal property. Where a fixed instrument, engine, or utensil is an accessory to a matter of a personal nature, it is itself considered personalty: per Lord *Ellenborough* in *Elwes v. Mawe* (c). *Trappes v. Harter* (d) shews, that where fixtures are capable of be-

(a) 5 De G. M. & G. 412.

(c) 3 East, 38, 53.

(b) 1 Sch. & Lef. 336.

(d) 2 Cr. & Mee. 153.

1856.
 MATHES
 v.
 FRASER.
 —
Argument.

ing moved, and have been used for the purpose of trade; they are personalty. And *Parke*, B., says in *Hellawell v. Eastwood* (a), where the machines in question were similar to the present, "The machines would have passed to the executor: per Lord *Lyndhurst*, C. B., in *Trappes v. Harter*. They would not have passed by a conveyance or demise of the mill. They never ceased to have the character of moveable chattels." This deed, therefore, did not pass the fixtures as part of the soil.

To hold the contrary, would be to introduce a distinction most injurious to persons in trade, viz. that, if a person in trade happens to be a freeholder, his mortgage will carry fixtures on the land even against his assignees, whereas, if he were merely tenant for a term of years, such fixtures would not pass.

But assuming that all fixtures upon this property are to be treated as part of the soil, and would be inferred to pass by a mere conveyance of the soil, without more, this is not such a conveyance. Here, certain fixtures are expressly enumerated in the clause, "and also all and singular the steam engine," &c.—which rebuts the inference that all fixtures passed by the mere conveyance of the soil: *Hare v. Horton* (b); and proves that nothing was intended to pass except such articles as are expressly mentioned, or fixtures ejusdem generis with articles so expressly mentioned; and that construction would exclude everything except machinery in the nature of that mentioned in the previous recitals as having been placed upon the premises by the mortgagor. But,

Secondly, if the Court should be of opinion that the articles in question did pass by the deed, then the deed was an

(a) 6 Exch. 295, 313.

(b) 5 B. & Ad. 715.

act of bankruptcy on the part of the mortgagors. It will be said, that the mortgagors had another place of business at *Manchester*, but how were they to meet the expense of setting up trade at *Manchester*? [The VICE-CHANCELLOR.— Might they not do so out of the very 7000*l.* advanced by the mortgagees?] The deed contains a covenant on the part of the mortgagors, not to remove from the premises any article comprised in the deed without the consent of the mortgagees. It was so framed as to bring within its operation not only everything which then existed upon the property, but everything which, during a period of seven years, might be fixed upon the property by the bankrupts. Besides,

Thirdly, upon the Plaintiffs' construction, the deed, not being registered pursuant to the Act 17 & 18 Vict. c. 36, is void. The case is clearly within the purview of the Act as set out in the preamble, and it is equally within the enacting clause. The 1st section extends to "every bill of sale of personal chattels." And the 7th section defines a "bill of sale" to include all assurances of personal chattels as security for any debt; and defines "personal chattels," as including "*fixtures*;" and with regard to "apparent possession" it provides, that "personal chattels" shall be deemed to be in the "apparent possession" of the person making or giving the bill of sale, so long as they shall remain or be in or upon any house, mill, warehouse, building, works, yard, land, or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal possession thereof may have been taken by or given to any other person."

[The VICE-CHANCELLOR.—If the Plaintiffs are right in their contention, that the fixtures passed by the conveyance of the land without more, then do you contend that the Bills of Sale Act can apply?]

Mr. *Little*.—We submit that it would.

1856.
MATHER
v.
FRASER.
Argument.

1856.
 MATHER
 v.
 FRASER.
 —
Argument.

[The VICE-CHANCELLOR.—If fixtures pass by a mortgage in fee of the land to which they are fixed ?]

Mr. *Little*.—If that circumstance is held to take a case out of the operation of the Act, the intention of the Legislature will be defeated. This case is within the words of the Act as well as the preamble; and it is certainly within its policy. It is impossible for the public to know whether a trader, carrying on trade with fixed capital, exceeding the value of the soil possibly a hundred fold, is owner of the freehold or not, or whether he has mortgaged or not.

[They cited also *Hallen v. Runder* (a), *Elliott v. Bishop* (b), *Horn v. Baker* (c), *Joy v. Campbell* (d), and *Ex parte Sparrow* (e).]

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Looking at the whole current of the authorities, it appears to me, that, upon the true construction of the deed in question, the fixtures passed by the grant of the land to which they were affixed.

In the description of the persons parties to the deed, the mortgagors are described as “ of the city of *Manchester*, copper roller manufacturers,”—not, as it was construed in the argument for the Defendants, as being the owners of the property quâ copper rolling, but as being copper roller manufacturers at *Manchester*, where, it appears, they had another mill. The deed then recites the purchase by them of certain plots of land in *Broughton*, with mills or factories

(a) 1 C. M. & R. 266.

(b) 10 Exch. 496.

(c) 9 East, 222.

(d) 1 Sch. & Lef. 336.

(e) 2 De G. M. & G. 907.

and buildings standing thereon; which mills or factories, it also appears, although that is not recited in the deed, were at one time used as silk mills or silk factories; and then it proceeds to recite, that they are carrying on business at these mills or factories as copper roller manufacturers, and that, in such capacity, they have lately affixed to, or placed upon, in, or about the said plots of land, mills or factories, and hereditaments, a steam engine and boilers, together with a large quantity of mill-gear and millwright work. They, therefore, describe themselves as owners of the land, and as turning it to account by converting it into a mill for the manufacture of copper rollers. That, according to the deed, was their mode of using and enjoying the land.

1856.
MATHER
v.
FRASER.
Judgment.

Now, assuming it to be possible, which Lord *Brougham* in *Fisher v. Dixon* (a) considered it was not, to distinguish between the case of machinery placed upon land for the purpose of trade or manufacture, as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the mere purpose of better and more profitably enjoying the land, such a distinction, allowing it the utmost weight, cannot avail the Defendants, inasmuch as it appears by the recitals in the deed, that the present case is one of the latter description,—that it was with a view to the better and more profitable use and enjoyment of the land that the machinery in question was placed upon it.

In *Fisher v. Dixon*, it is true that a portion of the subject matter to which the machinery in question was applicable was part of the soil itself, being the iron ore extracted from the very soil on which the machinery was placed. But if I read that case aright, it was with a view to the manufacture of the ore so extracted, and not otherwise to the enjoyment of the soil itself,—in other words, it was with a view to purposes of manufacture and trade, that the machinery was placed there; because it appears that the de-

(a) 12 Cl. & F. 312.

1856.
 MATHER
 v.
 FRASER.
 ———
Judgment.

ceased was owner of leasehold as well as of freehold property, and was working mines in the former as well as in the latter; and the statement that "a very valuable portion of his property consisted of engines employed in the business he carried on" (a), seems as applicable to engines employed upon ore raised from the leasehold as to those employed upon ore raised from the freehold. The machinery, therefore, did not work merely the produce of the land on which it was placed. In that case, however, Lord *Brougham*, in giving the reasons for his vote, says: "If a cider-mill be fixed to the soil, though it is a manufactory, and erected for the purpose of a manufactory, if it is really solo infixum, it is perfectly immaterial whether it is for the purpose of a manufactory, or a granary, or a barn, or anything else. It is a fixture on the soil, and it becomes part of the soil. Can any man say that one of the great brewhouses would belong to the executor because it is erected for the purpose of manufacture, and wholly unconnected with the land. For a brewhouse is as much unconnected with any crops upon the land upon which it is situated, as a cider-mill can be said to be; it is for the purpose of brewing beer out of malt, which need not have been raised on that land, but may have been grown in *Russia* or in *Africa*. It has nothing to do with the land, as may be seen by those who will take the trouble of looking at any of the brewhouses in *London*, which are established in places where it would be very difficult to find a blade of grass, much less a crop of barley of which to make malt. But, although it is a manufactory, nobody says it belongs to the executor, nor constitutes what the *Scotch* generally call an executry fund, it would go unquestionably to the heir" (b). Lord *Cottenham* is more cautious, as was his habit, in confining himself to the case before him; but he makes a remark which shews the inclination of his opinion upon the subject. He says: "Although, therefore, ma-

(a) 12 Cl. & F. 312.

(b) *Id.* 325, 326.

chinery is in its nature generally personal property, yet with regard to machinery, or a manufactory erected upon the freehold for the enjoyment of the freehold, nobody can suppose that that can be the rule of law"—namely, that it goes to the executor and not to the heir,—“and so with respect to other erections upon land. It is not necessary to go beyond the present case, which is a case of machinery erected for the better enjoyment of the land itself. The principle probably would go a great deal further”—(although he does not express himself as Lord *Brougham* does, he intimates that the inclination of his mind was, that the principle would go a great deal further);—“but it is more advisable to confine the observations I have to make to the particular circumstances of this case” (a). Lord *Campbell* makes this comment: “The learned and able counsel who argued for the appellant, were almost driven to admit, that, in this case, if the freehold had belonged, by hereditary descent, to Mr. *Dixon*, the machinery would have gone to the heir; but they said the land was purchased by him for the purpose of trade, and therefore this introduced a new distinction. This was assuming, that, if a great proprietor, such as Lord *Londonderry* in the county of *Durham*, were to erect machinery in his coal works, that would go to the heir and not to the executor; but that, if a person bought a piece of land for the purpose of a colliery, and erected machinery upon it, his having bought it would make a distinction as to the character of the machinery” (b).

1856.
 MATHER
 v.
 FRASER.
 Judgment.

Here the mortgagors bought the land as tenants in common in fee, and they recite, that, having so bought it, they were minded to make it profitable. In such a locality it would have been of comparatively little profit, unless it had been used for some manufacturing purpose. They conceived that the most profitable purpose for which they could use it

(a) 12 Cl. & F. 329.

(b) Id. 331.

1856.
 MATHER
 v.
 FRASER.
 ———
Judgment.

would be the business of copper roller manufacturers. I apprehend, therefore, that the case comes clearly within that of machinery affixed to land by the owner of the land, for the purpose of better and more beneficially using and enjoying the land of which he is the owner; and although the means of such use and enjoyment be manufacture or trade, still I am of opinion, that all such of the articles in question as are fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, are within the authority of *Fisher v. Dixon*, partake of the nature of the soil, and would have descended to the heir along with and as part of the soil itself.

It is well expressed in that case, that the principle upon which the old rule of law; that fixtures pass with the soil, was relaxed in favour of trade, has no application where, as here, the parties who affixed the machinery were themselves the owners in fee of the soil. According to the old rule of law, if that which would otherwise have been a chattel had been affixed to the soil, whether by nail, screw, or otherwise, it passed along with the soil to which it had been so fixed. In the relation of landlord and tenant, but in that relation alone, the rule of law was relaxed for the encouragement of trade; it being very early perceived that it would be injurious to trade if a tenant were told that he must contrive to conduct his trade with property which need not be fixed, in any way, to the soil, or he would at once be held to have made a present of it to his landlord; and, accordingly, as between landlord and tenant, questions of some difficulty have arisen, whether, in particular instances, chattels pass with the freehold of the land. But here,—and it was the case also as Lord Cottenham observed in *Fisher v. Dixon* (a),—no such question can arise. Here, the same parties were owners both of the fee and of the chattels in question. There

(a) 12 Cl. & F. 328.

was no landlord between whom and themselves the question could arise. In the exercise of their own discretion as to the disposition of the property, they fixed certain articles to the soil, and no question of encouragement to trade can arise. Here, therefore, and in all other cases where the owner of the chattel is also the owner of the fee, the Court can at once dismiss from its consideration the entire class of cases in which the rule of law has been relaxed in favour of trade, all such cases presuming the existence of the relation of landlord and tenant.

1856.
MATHER
v.
FRASER.
Judgment.

This consideration disposes of the decision,—I do not say, of the dictum,—in *Hellarwell v. Eastwood*(a). For the decision in that case there was abundant ground, irrespective of the dictum. The tenant had annexed to the freehold property which, as between him and his landlord, would have been held, on a determination of the lease, to be chattel property, which the tenant was entitled to remove. The landlord sought to distrain. There would have been a manifest inconsistency in holding such property exempt from distress, on the ground of its being annexed to the freehold, when, at the expiration of the lease, the Court must have held the very same property to belong to the tenant, notwithstanding such annexation. That case, therefore, in common with the numerous other cases upon the question of distress, has no application to the present. And, in fact, the only point for which it was cited was the dictum of a learned Judge, whose opinion is entitled to great weight, Mr. Baron Parke, who there makes this remark: “The machines would have passed to the executor: per Lord Lyndhurst, C. B., in *Trappes v. Harter*. They would not have passed by a conveyance or demise of the mill.” (He takes those two points). “They never ceased to have the character of moveable chattels, and were therefore liable to the Defend-

(a) 6 Exch. 295.

1856.
 MATHER
 v.
 FRASER.
 Judgment.

ant's distress" (a). That remark, however, is a mere dictum, not necessary to account for the decision, for which there was abundant ground in the circumstances I have mentioned; and I cannot but think that the numerous class of cases ending with that of *Fisher v. Dixon*, which does not appear to have been cited in *Hellawell v. Eastwood*, could not have been present to the mind of the learned Judge to whom that dictum is attributed.

On the other hand, the authorities, with reference to the right of the sheriff to seize fixtures under a fi. fa., point out very clearly the distinction to be drawn where the owner of the fixtures is also owner of the freehold to which they are annexed. In *Winn v. Ingilby* (b) it was held, that the sheriff had no right under a fi. fa. to seize fixtures where the house in which they are situated is the freehold of the person against whom the execution issues. There the question was as to ordinary house fixtures; but in *Place v. Fagg and Ashby* (c), the property in question was the stones, tackling, and implements necessary for the working of a mill; and the case, in that respect, applies more closely to the present. In fact, it has a double application to the present, for there, as here, there had been a mortgage of the mill, and it was held, that, by that mortgage, the stones, tackling, and implements necessary for the working of the mill passed to the mortgagee. Upon the other question, viz. that of the sheriff's right under a fi. fa., it was held, as in *Winn v. Ingilby*, that, under a fi. fa., the sheriff cannot take fixtures in a house whereof the freehold is in the debtor. That decision proceeded upon precisely the same principle as the one on which *Fisher v. Dixon* was decided, viz. that where machinery of this description has been attached to the freehold by the owner of the freehold himself, there, as between his heir and executor, the machinery is to be treated as defi-

(a) 6 Exch. 313. (b) 5 B. & Ald. 625. (c) 4 M. & Ry. 277.

natively fixed to and as passing with the freehold. The case came, I observe, before the Court of King's Bench when Mr. Justice *Parke* was a Judge of that Court. There was, first, a question as to whether the articles passed by the conveyance; as to which it was argued for the Plaintiff, that, in Sheppard's Touchstone, p. 90, it is said, that, by the grant of a mill, the millstone will pass, albeit at the time of the grant it be actually severed from the mill. Mr. Justice *Parke* observed, that no authority was there cited; but that, in *Liford's case*, it is said, and it is resolved in 14 Hen. 8, 25 b, in *Wystowe's case*, of *Gray's Inn*, that if a man has a horsemill, and the miller take the millstone out of the mill, to the intent to pick it to grind the better, although it is actually severed from the mill, yet it remains parcel of the mill as if it had been always lying upon the other stone, and, by consequence, by the lease or conveyance of the mill it shall pass with it. Mr. Justice *Bayley* gave judgment thus: "Fixtures which the tenant has a right to remove, may be treated as chattels in a proceeding against the tenant, but as against the owner of the estate they are part of the freehold. No delivery of the fixtures under the mortgage was necessary; for the reason already stated, they passed with the land." The other Judges, Mr. Justice *Parke* being one, concurred.

It seems to me exceedingly difficult to distinguish that case—a case of a millwright using a mill for the better enjoyment of his land—from that of millers of another description, whose business consists of rolling copper instead of grinding corn, and who, reciting that they are carrying on that business upon their land, convey the whole of the land upon which it is so carried on, in the terms to which I am about to refer.

Having recited that they are the owners of the land, and that they have erected "a steam engine and boilers, toge-

1856.
 MATHER
 v.
 FRASER.
 Judgment.

1856.
 MATHER
 v.
 FRASER.
 Judgment.

ther with a large quantity of mill-gear and millwright work," the parties in this case grant, release, and convey the plots of land, " and also all and singular the steam engine, steam boilers, mill-gear, millwright work and machinery, now or hereafter to be fixed to the said lands, hereditaments, mills or factories, buildings, and premises, or any of them, or any part thereof, together with all houses, outhouses, edifices, fixtures, buildings, roads, ways, paths, passages, waters, and right of water, watercourses, lights, liberties, privileges, easements, rights, members, and appurtenances whatsoever."

I apprehend, that, according to *Place v. Fagg and Ashby*, the mere grant of the land, following upon the preceding recitals, is sufficient to carry all such of the articles in question as were fixed to the soil in the manner I have described. The Court will, therefore, infer that all such articles passed by the mere grant of the land, unless in that which follows the grant of the land there is sufficient to rebut that inference.

In reference to this question it was argued on the part of the Defendants, that, although by a mere conveyance of the land and mills, without more, everything connected with the working of the mills and attached to the freehold might have been held to pass, yet, in this case, certain things so connected with the working of the mills and attached to the freehold are expressly enumerated in the clause: " and also all and singular the steam engine, steam boilers, mill-gear, millwright work, and machinery now or hereafter to be fixed to the said lands;" and the case of *Hare v. Horton*(a) was cited, to shew that this circumstance rebuts the inference, that everything connected with the working of the mills, and attached to the freehold, passed by the mere conveyance of the pieces of land and mills, and proves that no-

(a) 5 B. & Ad. 715.

thing was intended to pass except such things as are expressly enumerated; and, although, among the things so expressly enumerated, the word "fixtures" occurs, yet that word must be restricted to fixtures ejusdem generis with those previously mentioned, the consequence of which, it was contended, would be to exclude everything except machinery in the nature of that mentioned in the previous recitals as having been placed upon the premises by the mortgagors.

1856.
MATHER
v.
FRASER.
Judgment.

Now, I am of opinion, that this consequence would not follow, even assuming the inference in question to be rebutted by the enumeration of specific articles, which follows the grant of the land and mills: for the recital relative to the machinery was evidently inserted, not for the purpose which the argument presumes, but to shew that the mortgagors had brought their factory into complete and active operation.

But I am further of opinion, that the inference in question, viz. that everything connected with the working of the mills, and attached to the freehold, passed by the mere conveyance of the pieces of land and mills, is not rebutted by the subsequent enumeration of specific articles. Upon this point the case of *Hare v. Horton*—the only case cited on the part of the Defendants in support of this argument,—appears to me to have no application. It is clear to me, that, in this case, the object of the enumeration of specific articles was merely to shew that it was the intention of the mortgagors to pass all that the Court would infer to pass by a conveyance of the land. It may have been, and in my opinion it was, superfluous to enumerate those articles, which would have passed without any such enumeration. Indeed, in *Hare v. Horton*, it was held that the fixtures in the foundry would have passed by a mere conveyance of the foundry itself. But it cannot be said, that, because in this case specific ar-

1856.
 MATHER
 v.
 FRASER.
 Judgment.

ticles are expressly enumerated, they are, therefore, less part of the freehold or less attached to it.

Having arrived at the conclusion that everything connected with the working of the mill, and attached to the soil, passed by the mere conveyance of the land—and with the exception of the dictum of Mr. Baron *Parke* in *Hellawell v. Eastwood* (a), there is not a single authority in the way of that conclusion,—I have to consider how the recent case of *Ex parte Barclay* (b) bears upon the present. I think that it has a considerable bearing upon the present case, and furnishes a statement of the law as to the effect of conveyances of this description, which I am not only bound to respect from its authority, but which seems to be extremely clear and correct. There the question was one of reputed ownership. A firm of brewers had taken from a publican a deposit of a lease, with a memorandum by which he acknowledged that the firm were to be mortgagees of the leasehold property, of the fixtures and appurtenances to the premises belonging, and of the goodwill of the business. The Lord Chancellor says, and the Lords Justices concurred with him, “We assume, for the purpose of this argument, that these are fixtures which might be removed by the tenant without giving any ground of action to the landlord. Still, so long as the term subsists, they have no existence separate from the soil or building to which they are annexed; and in case of bankruptcy, the right to remove them, which belongs to the tenant, would pass to his assignees, and they would have against the landlord the same right as the bankrupt himself had. If, however, the bankrupt has, previously to his bankruptcy, parted with the house or building, he has, *primâ facie* at least, parted with the fixtures. This was the principle upon which the Court of Queen’s Bench acted in *Colegrave v. Dias Santos*, in 1834; and it can make no difference whe-

(a) 6 Exch. 295.

(b) 5 De G. M. & G. 403.

ther the conveyance is absolute, or only by way of mortgage."

1856.
MATHER
v.
FRASER.
Judgment.

In the present case, it is not necessary for me to go so far as the Lord Chancellor went in the passage I have cited from *Ex parte Barclay*, but I mention that case in reference to the argument, with which I was much pressed, that if I hold that the mortgage in this case carried the fixtures, I shall be introducing a distinction most injurious to persons in trade, viz. that, if a person in trade happens to be a freeholder, a mortgage by him of his land will carry fixtures on the land, even against his assignees, whereas, if he were merely tenant for a term of years, such fixtures would not pass. It is not necessary for me to determine whether such a result would follow or not; because the authorities I have referred to, and especially that of the House of Lords in *Fisher v. Dixon* (a), appear to me to go the whole length of supporting the decision at which I have arrived, whether such an absurd result as the argument represents would or would not follow from my decision. But it appears to me, that such a result would not necessarily follow. The cases of *fi. fa.* and of distress involve no such distinction as the argument implies. It does not follow, because a tenant's fixtures are liable, while he is in possession simply *quâ tenant*, to be distrained by his landlord, or to be taken in execution under a *fi. fa.* levied on him by a judgment-creditor, that, therefore, in a case where the tenant, while owner both of the land for the term and of the things fixed to the land, has assigned the land by words which in a conveyance of the freehold would have carried the fixtures, the mere circumstance of his being tenant for a term of years prevents such fixtures from passing by his conveyance. He has an interest in the fixtures, as the Lord Chancellor expresses it in *Ex parte Barclay*, and he has an

(a) 12 Cl. & F. 312.

1856.
 MATHER
 v.
 FRASER.
 —
Judgment.

interest in the land. Having an interest in both, the bankrupt in that case was held to have made over that interest in both to the firm, and for that reason it was that the Court held that the fixtures were not in his order and disposition, but were property as to which—whatever he might have been able to do before his assignment,—he could never after that assignment insist, as against the mortgagee, upon his right to remove any portion. Having mortgaged all his interest as tenant, to the extent of the term, and that interest extending to the fixtures as well as to the leasehold premises, he could not afterwards claim those fixtures as against the mortgagee, nor, I apprehend, would a *fi. fa.* against him have had any operation as against his own act. I am, therefore, of opinion, although, as I have already observed, it is unnecessary for me to decide this point, that the conclusion at which I have arrived in this case involves no such distinction as the argument represented, between the operation, as regards fixtures upon land, of a conveyance of the land by way of lease and release, where the owner is seised in fee, and that of an assignment of it for the residue of the term, where he is a mere tenant for years.

It remains to consider the effect of the covenant, on the part of the mortgagors, not to remove any of the particulars comprised in the mortgage without the permission of the mortgagees; in reference to which it was argued, that, if I held the mortgage-deed to pass the whole of the fixtures now in question, then, having regard to the covenant, it would follow that the mortgage was an act of bankruptcy.

From the commencement I had no doubt upon this part of the case. There was other property of considerable value to which the mortgagors were entitled; and I have not heard of any case in which an assignment of a portion of a trader's property has been held an act of bankruptcy. During the whole course of their business, prior to the date of the deed,

there is no trace of the bankrupts' having ever been arrested. The transaction, at the time it took place, was clear from all intention of fraud, both as regards the lenders and as regards the borrowers:—as regards the lenders, because it is plain that they expected the borrowers would carry on business for a considerable time, they lent their money for seven years, and clearly expected that the business would be carried on during the whole of that period; as regards the borrowers, because it appears that they endeavoured to stipulate that they should be at liberty to pay off the mortgage-debt within the seven years, and that was refused. Then, as to the subsequent operation of the transaction, the *Bartons* had other property in *Manchester*, where they once carried on business, and the 7000*l.* advanced to them upon the security of this mortgage would have enabled them, if it were necessary, to remove and set up business in *Manchester*.

1856.
 MATHER
 v.
 FRASER.
 Judgment.

But it was argued, that, if the mortgage had been enforced, and the whole of the property seized, the trade of the mortgagors would have been at an end. That argument assumes all the mortgage-money to have been improperly spent. The true construction of the bankrupt law is this: Is the act in question such as to put an end to all hope that the party will carry on the business? Here there was nothing of the kind. An advance of 7000*l.* was made, with which the *Bartons* might have gone on with their business. And I cannot compare the case with *Ex parte Sparrow* (a), of which I need say no more than that the present differs from it essentially in all the material elements which I have for consideration. This transaction is as open, and as free from any ingredient of fraud, as any that can well be conceived; and that being so, the mere circumstance of the insertion of the covenant not to remove any of the mortgaged particulars without the mortgagees' consent, cannot give to

(a) 2 De G. M. & G. 907.

1856.
 MATHER
 v.
 FRASER.
 —
Judgment.

it that effect for which the Defendants contend. Doubtless it may be inconvenient for a mortgagor to be obliged to consult his mortgagee before he is at liberty to remove a single article of property thus mortgaged; but I cannot infer that the mortgagees in this case would be likely to be so imprudent as regards their own interest,—not to say so unreasonable as regards the interests of the mortgagors,—as to use the power given them by the covenant in any way except such as would make the most of their security. That security consisted in the continuance of the business; and I cannot infer from the covenant that the mortgagees were thereby empowered to exercise an improper control so as to prevent its continuance.

If the fixtures passed in the manner I have described, by the mere grant of the land and mills or factories, it was conceded by Mr. *Daniel*, although Mr. *Little* did not seem quite to accede to that view, that the question as to the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 37), does not arise. It does not seem to me possible that it can arise. That Act only says, that where a person makes a bill of sale of any part of his chattels, including fixtures, that bill of sale must be registered in a particular way. Here, no bill of sale was ever required to be made. A conveyance is made of the freehold, and that conveyance carries fixtures. To hold that an Act of Parliament, which says, that, where bills of sale are used, they shall be dealt with in a particular manner, applies to a case where no such thing is used or required to be used, but where the whole of the property passes by the conveyance of the fee simple, would be to give a construction to the Act far beyond anything which was within its purview. To cases like that of *Ex parte Sparrow* (a) the Act would apply. There a bill of sale was made of all the effects in the house of the mortgagor, and the mortgagee was

(a) 2 De G. M. & G. 907.

entitled to come at a moment's notice and seize the whole of the property. Up to the moment of seizure he would not become the true owner, and he might have allowed, and did in fact allow, the mortgagor to go on to the very verge of bankruptcy before seizing, and so making himself the true owner of the property. That was a very great inconvenience, and for cases of that description the Act was intended by the Legislature as a remedy. But, I apprehend, the Act has no application to a case such as that before me, in which I am of opinion, for the reasons I have stated, that the fixtures passed by the conveyance of the land, so that from the moment when the conveyance was executed, the true ownership of the fixtures was in the mortgagees.

As to the particular articles, the cisterns, standing merely by their own weight, do not pass.

The only other articles about which there is any question, are those comprised in the fourth class. That class comprises one machine, consisting of two parts, the one being what is called a bed firmly fixed, as to which there is no doubt that it passed, the other of an instrument which runs upon this bed, and is therefore moveable, though fixed in its place from time to time by a kind of clamp or vice. In reference to this machine, the observations which I read of Mr. Baron Parke in *Place v. Fagg and Ashby*, are of importance, where he states, upon the authority of the old books, that, if the thing in question is an essential part of the machine, then, although moveable, and although it may have been actually removed for a particular purpose,—as a millstone removed for repair, still it is to be treated as belonging to the machine; and if the machine itself is held to be a fixture, the moveable part of it must be also so held. Here, the bed of the machine may be compared to the lower millstone, and the instrument in question which runs upon the bed, being admitted to be a part of the machine, al-

1856.
MATHER
v.
FRASER.
Judgment.

1856.
 MATHER
 v.
 FRASER.

Judgment.

though capable, like any moveable part of a steam engine, of being detached, must be held to be included within the meaning of the word "fixtures."

There must be a declaration that all the articles in question, with certain exceptions to be specified in the decree, and which will be confined to articles standing merely by their own weight, passed by the conveyance of the 23rd of August, 1854, to the Plaintiffs; and then there will be the common mortgage decree.

May 31st. IN THE MATTER OF THE BANKRUPT LAW CONSOLIDATION ACT, 1849.

AND

IN THE MATTER OF THE TRUSTS OF THE MARRIAGE SETTLEMENT OF CHARLES BANKHEAD AND MARIA HORATIA HIS WIFE.

Bankruptcy—
 12 & 13 Vict.
 c. 106, ss. 125,
 130—*Bank-*
rupt Trustee—
Order and Dis-
position—Con-
sent of true

Owner—Chose in Action—Appropriation of Securities—Declaration of Trust.

BY an indenture, dated 1825, being the settlement made in contemplation of the marriage of the petitioners *Maria Horatia Bankhead*, then *Paul* spinster, and *Charles Bankhead*, certain trust funds were assigned to Sir *Charles Mary*

A sole trustee, who had appropriated 4000*l.*, part of the trust property, deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds, two policies of assurance, one on his own life for 2000*l.*, the other on the life of his father for 3000*l.*, inclosing them in an envelope with a memorandum, that, "in the event of his" (the trustee's) "death," the amount of the inclosed policies was to be applied to the repayment of 4000*l.* borrowed by him of the cestui que trust. Six years afterwards the trustee became bankrupt. The policy for 2000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—*Held*, as between the cestui que trust and the assignees in bankruptcy,—

First, that, notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement.

Secondly, that, there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words "the true owner" within the meaning of the 12 & 13 Vict. c. 106; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests, the true owner and the reputed owner were the same person, and the 125th section of the Act did not apply. And an order was made, under the 130th section, for an assignment of the policy to the new trustees of the settlement.

Wentworth and Sir *John Dean Paul*, upon trust for the separate use of the petitioner, for life, without power of anticipation, and, after her decease, upon trusts for the benefit of her husband and the children of the marriage.

1856.
 In re
 BANKHEAD'S
 TRUST.
 Statement.

In 1844, a sum of 16,500*l.*, part of the trust funds, was paid to Sir *Charles* and Sir *John* as trustees of the settlement. In the same year Sir *Charles* died. In 1846 Sir *John* laid out portions of the 16,500*l.*, amounting to 7300*l.*, upon various mortgage securities, advanced other portions upon interest, and retained the remaining portion, amounting to 4000*l.*, in his own hands.

The settlement, and the securities for the funds subject to the settlement, were deposited by Sir *John Dean Paul* in a tin box, provided for the purpose shortly after the marriage, marked "*J. D. Paul, Bankhead's Trust.*" and kept in the strong room at the banking-house of the firm of *Strahan, Paul, & Bates*, of which he was a member.

Previously to August, 1848, Sir *John* had deposited in this box the deeds constituting the mortgage securities for the 7300*l.* And on the 26th of August, 1848, he deposited in the same box two policies of assurance, one for 2000*l.* effected upon his own life, and dated 21st of September, 1837, the other for 3000*l.* effected on the life of his father, and assigned to himself. These policies were inclosed in an envelope, together with a memorandum in these words:—"August 26th, 1848. *Temple-bar.* In the event of my death the amount of the inclosed policies of insurance for 3000*l.* and 2000*l.* to be applied respectively to the repayment of 4000*l.* borrowed by me of Mrs. *Bankhead*, at 4*l.* per cent. *J. D. Paul.*" The memorandum was signed by Sir *John* on the day of its date.

Upon the death of his father, the 3000*l.*, assured by the

1856.
 In re
 BANKHEAD'S
 TRUST.
 —
 Statement.

policy effected on the life of the latter was received by Sir *John*. The policy for 2000*l.*, together with the memorandum inclosed in the envelope, remained in the box from the 26th of August, 1848, to the time of Sir *John's* bankruptcy.

On the 11th of June, 1855, Sir *John* and his partners in the firm were adjudicated bankrupts.

The policy for 2000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the envelope in the tin box above mentioned.

The 4000*l.* was in the hands of the bankrupt, and due from him at the time of his bankruptcy.

By an indenture, dated the 4th of September, 1855, Sir *William Eden* and *Charles Ward* were appointed trustees of the settlement of 1825, in the place of Sir *Charles Mary Wentworth* and Sir *John Dean Paul*.

The assignees took possession of and claimed to retain the policy for 2000*l.*

A petition was now presented under the 130th section of the Bankrupt Law Consolidation Act, 1849, praying that the assignees might be ordered to assign, transfer, and deliver the policy for 2000*l.* to the trustees of the settlement, to the intent that the same might be held by them upon the trusts of the settlement, or such trusts as the same was subject to before the bankruptcy.

Argument.

Mr. *Rolt*, Q.C., and Mr. *W.D. Lewis*, for the petitioners:—

First, the memorandum was a valid declaration of trust, the words “ in the event of my death ” are to be interpreted

"upon my death," that event being certain, not contingent; or if used in a contingent sense, which however we dispute, the words can only mean "in the event of my death before the money is paid."

1856.
In re
BANKHEAD'S
TRUST.
Argument.

Secondly, the omission to give notice of the deposit at the insurance office was immaterial. It will be said, that, notice not having been given, the policy was left in the order and disposition of the bankrupt by the consent and permission of the true owner, and that therefore, by the 125th section of the Bankrupt Law Consolidation Act, the creditors are entitled. But, by the words "true owner," in that section, the Legislature must mean, in such a case as this, the person who is owner as against all the world except those claiming under the settlement. Tried by this test, Sir *John* was the true owner. To make out their case the assignees must shew, that, at law, he was not entitled to this policy—if they cannot shew this, he was the true owner. They cannot look behind his legal title to see whether it was not affected by a trust. Here, if Sir *John* was the reputed owner, he was also the true owner of the policy; and where the true owner and the reputed owner are the same person, the 125th section does not apply: Lord *Redesdale* in *Joy v. Campbell* (a). To bring the case within the statute there must be a real owner distinct from an apparent owner, and the real owner must consent to the apparent ownership as such: per Lord *Cranworth* in *Ex parte Barclay* (b). And, not a month since, this rule was acted upon by the Lords Justices in a similar case arising under this very bankruptcy: *Ex parte Graves*, *In re Strahan* (c).

[They cited also *Belcher v. Bellamy* (d), to shew that the policy of the law as to reputed ownership does not apply to choses in action, which the bankrupt has kept, perhaps, in

(a) 1 Sch. & Lef. 336.

(c) May 3rd, 1856, not reported.

(b) 5 De G. M. & G. 415.

(d) 2 Exch. 309.

1856.
 In re
 BANKHEAD'S
 TRUST.
 —
 Argument.

his desk, "no man having," as it was there said, "a reputed ownership of debts."]

Even if this had been a voluntary or unilateral declaration of trust, the equitable title of the cestui que trust would have been perfected without notice to the assurance office: *Pinkett v. Wright* (a); but here consideration passed—the trustee has spent the money.

Mr. *Daniel*, Q. C., for the trustees, took no part in the argument.

Mr. *Chandless*, Q. C., for the assignees:—

First, the memorandum is not a declaration of trust, but rather in the nature of a direction to Sir *John's* executors; for, whatever interpretation might have been put upon the words "in the event of my death" if the deposit had been merely of the policy upon his own life, here there was a deposit also of the policy on the life of his father. If the transaction had come to light before the bankruptcy, could the cestui que trust have maintained a bill to enforce the security?

Secondly, even if this was a valid declaration of trust, still, no notice having been given to the insurance office, the goods remained in the order and disposition of the bankrupt with the consent of the true owner, and the case is within the 125th section of the Act. The character of the trustee was affected by the circumstance of his being a debtor to the trust estate.

A reply was not heard.

(a) 2 Hare, 120.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The only question in this case is that as to the construction to be put upon the memorandum which accompanied the deposit of the policy in question, viz. whether the memorandum is a valid declaration that the policy was, in any event, to be subject to the trusts of the settlement. If that point is clear, then, I apprehend, that the other objection, viz. that which turned upon the 125th section of the Bankrupt Law Consolidation Act, 1849, is removed by the recent decision of the Lords Justices in *Ex parte Graves, In re Strahan*. If you once get a sufficient declaration of trust by a party who is the sole trustee, he is the proper person to be in possession of the policy,—in other words, he is “the true owner” within the meaning of the Act; and he being also in the reputed possession of the property when the bankruptcy takes place, there is no separation of interest, the true owner and the reputed owner are the same person; *Joy v. Campbell* (a) shews that the 125th section of the Act does not apply; and, as was held by the Lords Justices in *Ex parte Graves*, the policy, when the bankruptcy takes place, is affected with the trust.

If this had been merely a voluntary declaration on the part of Sir John Dean Paul, a serious question might have been raised as to its effect. But that was not the case. He was a trustee, had spent part of the trust money, and was a debtor for the amount so spent to the trust estate; and being in that position, he, by this memorandum and deposit, takes express notice of the trust and of his debt.

Then, as to the previous question of the construction to be put upon the memorandum, if the deposit had been simply of the policy upon his own life, no question could have been raised as to the effect of the words “in the event of my

1856.

In re
BANKHEAD'S
TRUST.

Judgment.

(a) 1 Sch. & Lef. 328, 336.

1856.
In re
BANKHEAD'S
TRUST.
 —
Judgment.

death," since the meaning would have been obviously that for which the petitioners contend. The difficulty is raised by the circumstance, that it was a deposit not only of the policy on his own life, but also of the policy on the life of his father—a circumstance which certainly affords an argument in support of the construction for which the assignees contend, viz. that the memorandum was intended as a direction to the bankrupt's executors.

Looking, however, to all the circumstances of the case,—to the facts that the bankrupt was a debtor to the trust estate, that he took express notice of the trust and of his debt, and to the circumstance of the deposit of the policies in the box, I think, that, if there is a doubt, I ought to consider these circumstances as shewing that it was his intention to do, by means of the memorandum in question, that which it was his duty to do, viz. to provide, in any event, for the payment of the 4000*l.* which he owed to the trust estate. I therefore hold, that, notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, to be subject to the trusts of the settlement.

The result is, that there must be an order according to the prayer of the petition.

With regard to costs, there was sufficient doubt upon the questions involved to entitle the assignees to raise the question. There will therefore be no costs on either side. The costs of the assignees will come out of the bankrupt's estate. Those of the petitioners and of the trustees out of the trust estate.

1856.

MASON v. BAKER.

May 1st &
27th.

ELIZABETH LLOYD, widow, by her will, dated in 1852, amongst other things, made the following bequests:—"2000*l.* 3*l.* per Cent. Consolidated Annuities, and all such dividends and interest as may be due thereon at the time of my decease, unto my brother-in-law the said *G. Mason*, his executors and administrators; and, in order to give effect to this my will, I request that the said *William J. Cubitt* will unite with him or them in executing any deed or instrument which might be deemed necessary, upon trust, that he or they may, within six calendar months thereafter, assign, pay, and divide the same in manner following; that is to say, unto my brother the Rev. *Richard Baker*, 200*l.* sterling, should he survive me, if not, then I direct the same to be divided amongst his children, share and share alike; unto my nephew *Richard Baker*, 200*l.* sterling; unto my niece *Sarah Baker*, 200*l.* sterling; unto my sister *Mary*, the wife of the said *George Mason*, 200*l.* sterling, but should she not survive me, the same to be equally divided between her two daughters, *Annie Farish*, the wife of the Rev. *Charles Maxwell*, clerk, and *Elizabeth Mary*, the wife of *John Nevill*, Esq.; and unto my niece the said *Annie Farish Maxwell*, I also give the sum of 100*l.* sterling; also I give and bequeath unto my sister *Judith Vickens*, widow of the late Rev. *J. Vickens*, the interest of the sum of 200*l.* sterling, reserved for that purpose, during her natural life, and, after her decease, I direct that the principal and interest shall be divided between my nephew the Rev. *Thomas Baker*, of *Botley*, and my niece the said *Annie Farish Maxwell*." And after giving certain other legacies, the will continued:—"I also direct my executors to sell, by public auction, all my household furniture and other effects of which I may be possessed at the time of

Will—Construction—Children of A. and B.

A bequest of residue "to all the children of my brother *R.* and my sister *M.*, to be equally divided between them, share and share alike." *R.* and *M.* having equal legacies in a former part of the will, and there being nothing in the context from which an intention could be inferred that *M.* was personally to take an equal share in the residue with the children of *R.*, this construction was rejected, and the gift was held to pass the residue to the children of *R.* and the children of *M.* in equal shares.

1856.
 {
 MASON
 v.
 BAKER.
 —
Statement.

my decease, and to apply the money arising therefrom in the discharge of my just debts, funeral and testamentary charges, and any surplus to sink into the residue of my property hereinbefore mentioned, subject to the legacies and payments particularly specified in this my will; and as concerning such residue, I give and bequeath the same to *all the children of my brother Richard Baker, and my sister Mary Mason, to be equally divided amongst them, share and share alike*; and, lastly, it is my will and desire that all the gifts and bequests made to my said niece *Annie Farish Maxwell* and *Elizabeth Mary Nevill*, together with all interest to accrue thereon, be for their, and each of their, sole and separate use and benefit, notwithstanding their respective coverture, their and each of their receipts alone being a sufficient discharge for the same. And hereby revoking all former wills by me at any time heretofore made, I do declare this to be my last will and testament or testamentary appointment."

One of the questions in the suit was as to the effect of the gift of residue.

On the one hand it was argued, that the gift should be read as though it were worded "to all the children of my brother *Richard Baker* and of my sister *Mary Mason*." And another construction suggested was, "to all the children of my brother *Richard Baker* and to my sister *Mary Mason*," equally &c.

Argument.
 —

The question was argued for the various parties interested, by Mr. *Rolt*, Q. C., and Mr. *Beavan*; Mr. *Willcock*, Q. C., and Mr. *W. Terrell*; Mr. *W. M. James*, Q. C., and Mr. *Tripp*; and Mr. *Daniel*, Q. C., and Mr. *Hetherington*.

The cases cited on this point were *Lugar v. Harman* (a), *Peacock v. Stockford* (b), and *Doe v. Joinville* (c).

1856.
MASON
v.
BAKER.

His Honor reserved his judgment,

VICE-CHANCELLOR SIR W. PAGE WOOD, (after disposing of some other questions of construction on the will, continued as follows):—

May 27th.
Judgment.

There remains the question of the grammatical construction of the gift of the residue "to all the children of my brother *Richard Baker* and my sister *Mary Mason*, to be equally divided amongst them, share and share alike." The testatrix had previously given to *Richard Baker* 200*l.*, and directed, that, if he did not survive her, it should be divided amongst his children: she then selected two of these children, and gave them 200*l.* each; and she had made a similar bequest to *Mary Mason*, and in case she did not survive her, to her two daughters, and then to one of such daughters she gave 100*l.*; then, having given to this brother and sister equal legacies of 200*l.* each, and made these provisions for their children, she makes the residuary bequest which I have read. In strict criticism a good deal may be said in favour of the view, that, if the children of *Mary Mason* were intended, the idiom of our language requires that the word "of" should be supplied before the words "my sister *Mary Mason*;" and that this is more necessary than it would be to insert the word "to" in the same place, if the other construction suggested be the true one. Some little additional force might perhaps be given to the first construction, from the fact, that the testatrix, having previously mentioned two of the children of *Richard* and of *Mary*, might intend by this bequest to benefit not those children only, but all the other

(a) 1 Cox, 250. (b) 3 De G. M. & G. 73. (c) 3 East, 172.

1856.
MASON
v.
BAKER.
Judgment.

children of her brother and sister. In support of the other construction, the case of *Lugar v. Harman* (a) was cited, in which the gift was to the children of my late cousin *Edward Lugar*, and my cousin *Philip Fearis*, and their lawful representatives; and *Edward Lugar* being dead at the date of the will, his children and *Phillip Fearis* himself, and not the children of *Philip Fearis*, were held to be entitled in equal shares—and the circumstance of *Edward Lugar* being dead made that a reasonable construction. There is nothing on the face of this will which makes it probable that the testatrix meant to treat her sister *Mary* differently from her brother *Richard* in this bequest; and unless the genius of our language is opposed to it, I should think the construction was, that this was a gift to the children of *Mary* to share equally with the children of *Richard*. I can scarcely say that it is idiomatic *English*, to use the expression “I give to the children of *A.* and *B.* in equal shares,” meaning to give to the children of one and of the other of them; but on the other hand, the other construction seems to me equally to require the introduction of the word “to;” and, on the whole, seeing that this brother and sister of the testatrix are placed in exactly the same position in other parts of the will, I see no reason for preferring the parent in one case and not in the other, and I must, therefore, hold that the children of *Richard* and *Mary* take this residue equally.

(a) 1 Cox, 250.

1856.

ATTORNEY-GENERAL v. MURDOCH.

May 7th.

THE information and bill were filed to have the Defendant *Murdoch* removed from being minister of the *Low Meeting-house* at *Berwick-upon-Tweed*, and to have the Defendants *Wilson*, *Smith*, and *Thompson*, three trustees of the meeting-house, declared guilty of a breach of trust, and removed, and to have new trustees appointed, the above-named Defendants having adopted the opinion of the Free Church of *Scotland*, whereas, by the trusts of the meeting-house, the congregation was to be in as strict connexion as practicable with the established Church of *Scotland*.

Costs—Trustees—Religious Congregations.

Trustees of a congregation, which, by the terms of its trust, was to be in connexion with the established Church of *Scotland*, adopted the opinions of the Free Church of *Scotland*, and refused to retire from the trust. They were ordered to pay the costs of the appointment of new trustees.

Statement.

The facts and proceedings on the hearing of the cause are reported in Mr. *Hare's Reports* (a).

By the decree, which was affirmed with costs, on appeal, by the Lords Justices, it was declared, that the meeting-house was subject to trusts for the appropriation thereof as a place of worship on the model of the established Church of *Scotland*. It was ordered that the Defendant *Murdoch* should be restrained from officiating as minister, and that the Defendants *Wilson*, *Smith*, and *Thompson* should be removed from the trusteeship. It was referred to the Master to appoint new trustees in their place and in the place of two deceased trustees; and it was ordered, that the congregation of the chapel should elect a new minister and new trustees. It was also referred to the Master to inquire as to two debts incurred for repairs of the chapel and secured by two promissory notes of the trustees.

In pursuance of the decree, the congregation elected a

(a) Vol. vii, p. 445.

1856.
 ATT.-GEN.
 v.
 MURDOCH.
 Statement.

minister and new trustees, who were approved by the Master.

The Defendant *Thompson* was out of the jurisdiction.

The cause now came on for further directions.

Argument.

Mr. *Little* and Mr. *T. Deere Salmon*, for the relators and Plaintiffs, asked that the Defendants *Murdoch*, *Wilson*, and *Smith* might be ordered to pay such of the costs subsequent to the decree as had been caused by the appointment of the new trustees, as being costs occasioned by them, their breach of trust having caused the suit and the necessity for their removal.—They referred to the order as to costs in the *Attorney-General v. Munro*(a), as being in totidem verbis with that which they sought.

Mr. *Rolt*, Q. C., for the Defendants *Murdoch*, *Smith*, and *Wilson*:—

The Defendants are entitled to have their costs out of the estate. Their only fault (if fault it be) is, that they have changed their religious views, and thereby become, in the opinion of the Court, disqualified for this particular trust.

The rule is, that, even where there has been a direct breach of trust on the part of a trustee, he gets the costs of all proceedings subsequent to his retirement, although all such proceedings were caused solely by his misconduct.

In the *Attorney-General v. Munro* the trustees had allowed a colourable ejectment, whereby the legal estate became vested in parties who were never intended to have it; and the case is distinguishable on that ground.

(a) Not reported on this point.

Mr. *Lewin* for Defendants in the same interest with the Plaintiffs.

1856.
ATT.-GEN.
v.
MURDOCH.

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

If a trustee voluntarily retires from a trust like the present on account of difference of opinion, he pays no costs—whether he will receive costs is a question for the discretion of the Court, and may depend upon the circumstances of his retirement.

Judgment.

But here, all the proceedings in the suit have been occasioned by the trustees' refusal to retire from their trust. They took what the Court considered an improper and perverse view as to the duties imposed upon them, and the suit for their removal and all proceedings consequent thereon have been occasioned by their taking that view. All the costs now in question have been caused by this improper conduct on the part of the trustees in refusing to retire from the trust. Whatever differences there may be between this case and that of the *Attorney-General v. Munro* (a), were disposed of by the decree. The hostile Defendants, therefore, must pay the costs of the appointment of the new trustees, except any costs occasioned by the Defendant *Thompson* being out of the jurisdiction.

The hostile Defendants were entitled, however, to appear before the Master, to shew that the debts secured by the promissory notes were properly incurred, and were not a breach of trust, and that they ought to be a charge upon the trust property. The relators and Plaintiffs must therefore pay

(a) 2 De G. & S. 122.

1856.
 ATT.-GEN.
 v.
 MURDOCH.
 —
Judgment.

those Defendants their costs of the inquiry as to the promissory notes and debts on the trust property. The above costs must be set off against each other. No other order will be made as to the costs of the hostile Defendants.

The costs of Mr. *Lewin's* clients will be paid by the Plaintiffs.

*Minute of
 Order.*
 —

ORDERED accordingly. The Plaintiffs to be at liberty to raise, by a mortgage of the trust property, the costs paid by the Plaintiffs to the Defendants, and the Plaintiffs' extra costs, charges, and expenses of suit not paid by the hostile Defendants, and the debts owing on the promissory notes.

An order was also made for the appointment of new trustees, and vesting in them the trust property, including the interest of the Defendant *Thompson*, who was out of the jurisdiction.

*April 17th,
 18th, & 22nd.*

ARNOLD v. THE MAYOR, ALDERMEN, AND
 BURGESSES OF THE BOROUGH OF GRAVES-
 END.

*Municipal
 Corporations—
 Judgment—
 Charge—5 & 6
 Will. 4, c. 76,
 ss. 92, 94.—
 Bond Debt previous to—6 & 7 Will. 4, c. 104—7 Will. 4 & 1 Vict. c. 78—1 & 2 Vict. c. 110,
 ss. 18, 121.*

BEFORE the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, the Defendants borrowed from the Plaintiff, at interest, ten sums of 100*l.* each, for the purposes of

Judgment upon a bond given by a municipal corporation before the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76) *Held*, under 1 & 2 Vict. c. 110, s. 13, to operate as a charge upon all lands and hereditaments of the corporation, whether acquired before or after the passing of the Municipal Corporation Act, the Court being of opinion, that, even if the latter statute, standing alone, would have prevented the judgment-creditor from charging after-acquired lands, which, *semble*, it would not, that objection was removed by the 6 & 7 Will. 4, c. 104, s. 1; and that the power by that section given to municipal corporations of charging their lands and hereditaments for securing repayment and satisfaction of any debt contracted by them before the passing of the Municipal Corporation Act, is a power which they might exercise "for their own benefit," within the meaning of 1 & 2 Vict. c. 110, s. 13, the words "for his own benefit" meaning no more than "for his own use," "not as a trustee."

Observations on *Arnold v. Ridge* (13 C. B. 745).

an Act for rebuilding and maintaining the Town-Quay of *Gravesend*, and executed and delivered to the Plaintiff ten mortgages or assignments of certain shares of the rates, tolls, or duties by the said Act authorised to be levied.

As a collateral security for the 1000*l.* and interest, the Defendants, in pursuance of an agreement made upon the treaty for the loan, delivered to the Plaintiff a bond dated the 16th of October, 1828, whereby they bound themselves and their successors to the Plaintiff, his executors, administrators, and assigns in the penal sum of 2000*l.*, conditioned to be void if the Defendants should pay to the Plaintiff, his executors, administrators, or assigns, by half-yearly payments, interest at 5*l.* per cent. upon the sums secured by the said mortgages or assignments, or upon so much thereof as might, from time to time, remain unpaid.

Interest was duly paid to the Plaintiff up to the 16th of April, 1850, inclusive, but not subsequently. In January, 1852, the Plaintiff brought an action to recover the penal sum secured by the bond; and, on the 19th of March, 1852, he recovered judgment in the action for 2000*l.*, the penalty of the bond, and 15*l.* 10*s.* 6*d.* damages. The judgment was registered by the Plaintiff on the 20th of March, 1852, pursuant to the statute.

The bill was for a declaration that the Plaintiff's judgment was a charge upon certain leasehold hereditaments demised to the Defendants since the passing of the Municipal Corporation Act, subject to five judgments prior to the Plaintiff's; and for an account of what was due to the Plaintiff for principal, interest, and costs upon his judgment. It also prayed, that the leasehold premises might be sold, and the proceeds of the sale applied in payment of the amount so due to the Plaintiff, and that the deficiency, if any, might be raised by sale of other hereditaments of the Defendants, subject to prior charges and incumbrances.

1856.

ARNOLD

v.

THE MAYOR
&c. OF
GRAVESEND.

Statement.

1856.
 {
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.

It appeared, that, since the passing of the Municipal Corporation Act, two freehold estates had been acquired by the Defendants in addition to the leaseholds mentioned in the bill.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the Plaintiff:—

The judgment, upon being entered up, became, under 1 & 2 Vict. c. 110, s. 13, and now is, a charge upon all the lands and hereditaments of the Defendants, whether acquired before or since the passing of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76.

The Defendants will rely on the decision of the Court of Common Pleas in *Arnold v. Ridge* (a). But the decision in that case is not conclusive as to the present, the proceedings there being under the 11th section of 1 & 2 Vict. c. 110, whereas we are proceeding under the 13th section of that Act. And with regard to the reasoning upon which that decision was founded, we submit, first, that the interpretation put by the Court of Common Pleas upon the 5 & 6 Will. 4, c. 76, is erroneous, inasmuch as that Act was not intended by the Legislature to prevent persons, who, before it was passed, were creditors of a municipal corporation, from charging lands acquired by the corporation after the passing of the Act; secondly, that such reasoning, even if sound, proceeded solely upon the 5 & 6 Will. 4, c. 76, without reference to either of the subsequent statutes, 6 & 7 Will. 4, c. 104, and 7 Will. 4 & 1 Vict. c. 78, s. 28, under which the Defendants clearly have the power of charging the lands in question with debts contracted before the passing of the Municipal Corporation Act.

(a) 13 C. B. 745.

Mr. Willcock, Q. C., and Mr. H. Stevens, for the Defendants:—

The present case is concluded by the reasoning of the Judges, if not by their decision, in *Arnold v. Ridge* (a), where the point in dispute was the effect of this very judgment. The borough-fund, into which, by the 92nd section of the 5 & 6 Will. 4, c. 76, all the fruits of the corporate property were required thenceforward to be collected, is not applicable for payment of a debt like the Plaintiff's. The words "subject to the payment of any lawful debt," in the 92nd section, must mean a debt capable of being "redeemed," as is clear from the use of the words "redeemed" and "unredeemed" in the immediate context; and with regard to the clause "saving all rights &c. by virtue of any proceedings either at law or in equity," that clause must apply to rights existing when the Act passed, and at that time the Plaintiff had no claim against a particle of the land of the corporation. He had a right to sue for a penalty if his interest was not paid, but so long as interest was paid he could not sue, and interest was paid down to April, 1850. And if he had no right at the passing of the Act, the proviso at the close of the 92nd section shews clearly that he acquired none by virtue of the Act. The borough-fund is simply a trust fund, and the trusts upon which it is to be held are wholly foreign to a purpose like the present: *Attorney-General v. The Mayor of Norwich* (b), *Attorney-General v. Aspinall* (c), *Attorney-General v. Wilson* (d).

Then as to the Act 6 & 7 Will. 4, c. 104, the deeds which, by the 1st section of that Act, corporations are empowered to execute, must be executed subject to the restrictions imposed by the 94th section of the former Act. The power

(a) 13 C. B. 745.

(b) 2 My. & Cr. 406.

(c) 2 My. & Cr. 613, 619.

(d) Cr. & Ph. 1.

1856.
ARNOLD
v.
THE MAYOR
& C. OF
GRAVESEND.
Argument.

1856.
 {
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Argument.

given by the 6 & 7 Will. 4, c. 104, is a power which they must exercise as trustees with due discretion, with proper regard to the number of debtors who may be in a similar position with reference to antecedent debts, and all other matters to be submitted to them for deliberation, and further, with due regard to that public trust, which, since the passing of the Municipal Corporation Act, attaches to all corporate property.

The Act 7 Will. 4 & 1 Vict. c. 78, s. 28, only empowers the corporation to pay out of the borough-fund, and that fund cannot be touched by execution. The Act does not introduce any new word, such as bond, mortgage, or charge, or anything amplifying the powers given by the preceding Acts. It has only made such powers applicable to a substituted debt instead of to the original debt of the corporation.

As to after-acquired property, the Defendants' case is, if possible, stronger; for, since the passing of the Municipal Corporation Act, the corporation has been a new body, new in all its qualities, powers, and capacities; and the rights (if any) against property acquired by such a body must be restricted to rights arising out of the powers given to the body by virtue of the Act which called it into existence.

The corporation, therefore, was found by the Act 1 & 2 Vict. c. 110, in the position of simple trustees,—with certain powers, it is true,—but powers to be exercised by them not as owners but as trustees, for the benefit of others not for their own benefit; and even if the Court should be of opinion, upon the construction of the Acts of Parliament, that the consent of the Lord Commissioners of the Treasury was not requisite to their exercise, still they are not such powers as the Legislature contemplated, when it proposed to give to a judgment at law the effect of a charge executed by the owner of the estate.

[They cited the judgment of Lord Justice *Knight Bruce* in *Hawkins v. Gathercole* (a).]

Mr. *Rolt*, Q. C., in reply.

[*Holdsworth v. The Mayor &c. of Dartmouth* (b) was also cited.]

Judgment reserved.

1856.
ARNOLD
v.
THE MAYOR
&c. OF
GRAVESEND.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

April 22nd.
Judgment.

I should have felt great difficulty in determining the matter before me, regard being had to the judgment of the Court of Common Pleas in *Arnold v. Ridge* (c), had it not appeared to me, that, even if I entirely concurred in that judgment, the case before me depends upon a very different view resulting from a statute which was passed after the Act 5 & 6 Will. 4, c. 76, usually called the Municipal Corporation Act, namely, the Act 6 & 7 Will. 4, c. 104, a statute which was not cited during the argument before the Court of Common Pleas, and which seems to me to have, at least with regard to the matter now before me, a conclusive bearing as to the remedies of parties who were creditors of old corporations anterior to the passing of the Municipal Corporation Act.

The case upon which the present question arises is a simple case of a bond debt, by which the Corporation of Gravesend, before the passing of the Municipal Corporation Act, secured the payment of annual interest upon a sum of 1000*l.* advanced by the Plaintiff for the benefit of the corporation. The 1000*l.* was secured by ten several mortgages or assignments of certain shares of the rates, tolls, or duties, which the corporation were empowered by special Acts of

(a) 6 De G. M. & G. 1, (in the press). (b) 11 A. & E. 490.
(c) 13 C. B. 745.

1856.
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 ———
Judgment.

Parliament to mortgage or assign for that purpose; and it was collaterally secured by a bond in the penal sum of 2000*l.* conditioned to be void upon payment of interest at the rate of 5*l.* per cent. upon the respective sums secured by the mortgages or assignments, or upon so much or such part thereof as might from time to time remain unpaid. The Plaintiff being possessed of that security the following Acts were passed, viz. the 5 & 6 Will. 4, c. 76, commonly called "The Municipal Corporation Act," the 6 & 7 Will. 4, c. 104, intitled "An Act for the better Administration of Borough Funds in certain Boroughs," and the 7 Will. 4 & 1 Vict. c. 78, which also has in some respects a bearing upon debts contracted anterior to the Municipal Corporation Act. In March, 1850, the Plaintiff recovered judgment, which he registered on the 20th of March, 1852, in respect of an arrear of interest upon his bond, and the question is whether, by virtue of the Act 1 & 2 Vict. c. 110, the judgment operates as a charge upon property acquired by the corporation after the passing of the Municipal Corporation Act.

I will assume, in the first instance, that I am bound to follow the decision of the Court of Common Pleas in *Arnold v. Ridge* (a), and I will consider what would be the effect of following that decision.

The Municipal Corporation Act, by its 92nd section, provides, in effect, that after a given time there mentioned, all the income arising from the property of the borough, whether real or personal, shall be paid to an officer, to be called the Treasurer of the Borough Fund; that the fund arising from such payments shall be called the Borough Fund; and that such fund, "subject to the payment of any lawful debt," as described in a clause on which I will make some observations presently, and saving certain rights,—which the

(a) 13 C. B. 745.

corporation might consider, upon the authority of *Arnold v. Ridge*, as not comprising the claim of the bond creditor in this case upon after-acquired property,—shall be applied so as in effect to make the new corporation trustees for public purposes, whereas, previously to the Municipal Corporation, Act, corporations had been owners of the corporate funds and capable of disposing of them in any manner they pleased. The 92nd section having thus, as it were, fastened a trust upon the whole income of the property of the corporation, the 94th section proceeds to secure the due execution of that trust, by providing that it shall not be lawful for the council of any body corporate to be elected under the Act to sell, mortgage, or alienate any part of the lands, tenements, or hereditaments of the body corporate, except in pursuance of some contract, covenant, or agreement bonâ fide made or entered into on or before the 5th of June, 1835. It then provides, that, in every case in which the council shall deem it expedient to sell and alienate or to demise and lease their property for more than thirty-one years, it shall be lawful for them to do so, with certain consent on the part of the Lords Commissioners of the Treasury.

I cannot read the first part of the 94th section as doing less than prohibiting absolutely all dealing whatever with the land of the corporation except under some covenant, contract, or agreement fixing the land, which of course a bond would not do; and in this respect the wording of the 94th section appears to have occasioned, in some degree, the subsequent Act 6 & 7 Will. 4, c. 104. The 94th section of the former Act had expressly provided that there should be no mortgage whatever of the corporation property, but it allowed selling, alienating, and demising or leasing, with the consent of the Lords Commissioners of the Treasury; and it might well be doubted, having regard to the express prohibition against mortgaging, with a permission only to sell or alienate with certain consent, whether a mortgage

1856.
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 Judgment.

1856.
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Judgment.

was within that permission of sale or alienation with such consent; and that was one of the objects intended to be met by the Act to which I am now about to refer.

But besides that, it appears to have occurred to the Legislature,—I am now assuming for the purpose of this discussion that the intention of the Legislature, as expressed in the Municipal Corporation Act, was such as it has been declared to be by the decision of the Court of Common Pleas in *Arnold v. Ridge*—that persons who were creditors of corporations before the passing of that Act might be seriously injured, for at the time when such debts were contracted, the creditors would consider the corporation as they would an individual, viz. as a body competent to deal with their property present or future, and would therefore expect to exercise their rights against future as well as present property. It appeared to the Legislature that it was right to make some provision in respect of such bonâ fide creditors, besides giving power to mortgage as well as to alienate with the consent of the Lords of the Treasury; and accordingly, in the following year, they passed the Act 6 & 7 Will. 4, c. 104, intituled “An Act for the better Administration of the Borough Fund in certain Boroughs.” That Act commences with this preamble, “Whereas, by an Act passed in the last session of Parliament, intituled an Act to provide for the regulation of municipal corporations in England and Wales” (meaning the Act 5 & 6 Will. 4, c. 76) “provision was made for the payment of the rents and profits of the real and personal estate of the Mayor, Aldermen, and Burgesses of certain Boroughs named in the schedules (A) and (B) to the said Act annexed, and also for the payment of certain penalties, to a fund to be called, in each case, The Borough Fund of that Borough: And whereas certain difficulties have occurred in putting the said Act into execution, and certain penalties have been imposed which ought not to be imposed, for the benefit of the said Borough Fund:” and it then

enacts, that, after the passing of the Act "it shall be lawful for the council of any borough named in the said schedules, to execute from time to time any deed or obligation in the name of the body corporate whose council they are, for securing repayment and satisfaction of any debt or obligation contracted by or on behalf of the said body corporate before the passing of the said Act for regulating corporations."

1856.
 ———
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 ———
Judgment.

The next clause seems to me to be of a totally different character,—applicable to a totally different subject-matter,—and not in any way to limit or interpret the preceding clause. It enacts, "That the power of disposition given to the council of any body corporate in the instances of demises of seventy-five years, authorised by the said Act, shall extend to the demise or lease thereof, either at a reserved rent or a fine, or both, as the council shall think fit, and the power of disposition allowed by the said Act over the lands, tenements, and hereditaments of such body corporate to be exercised with the approbation of the Lords Commissioners of his Majesty's Treasury, or any three of them, shall extend to the disposition of such lands, tenements, and hereditaments, with such approbation as aforesaid, whether by way of absolute sale, or by way of exchange, mortgage, or charge, demise, or lease, and to every other disposition of the same whatsoever, which shall be so approved of as aforesaid." The 1st section was intended to apply to debts contracted anterior to the Municipal Corporation Act; the 2nd section enables the council, with the approbation of the Treasury, to make mortgages generally for any purpose, whether for debts contracted anterior or subsequent to the Act. The latter was obviously intended to give a power to raise money by way of mortgage as well as by sale, for the benefit of the town and the like, in such manner as the Lords Commissioners of the Treasury should approve of, and is not in any way connected with the previous section relating to anterior debts.

1856.
 ———
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 ———
Judgment.

To shew how anxious the Legislature was to provide for debts contracted anterior to the passing of the Municipal Corporation Act, Mr. *Speed* referred me to a subsequent Act, the 7 Will. 4 & 1 Vict. c. 78, the 28th section of which recites the Act 6 & 7 Will. 4, c. 104, upon which I have been commenting, and then enacts, "that any money borrowed by any such council," meaning any council of any of the scheduled boroughs, "for the purpose of being applied, and which shall be actually applied, in or towards satisfaction and discharge of any such pre-existing debt or obligation, shall be deemed and taken to be within the true intent and meaning of the said Act of the last session of Parliament, a debt contracted by or on behalf of such body corporate before the passing of the said Act for regulating corporations:"—so as to secure in every possible way the payment of those anterior debts.

If I now turn to the 13th section of the 1 & 2 Vict. c. 110, the section under which the Plaintiff is applying for his remedy, I find it enacts, that a judgment entered up against any person—and the word "person" is so defined by the 121st section as to include a body corporate—shall operate as a charge upon all lands, &c. "of or to which such person shall, at the time of entering up such judgment, or at any time afterwards, be seised, possessed, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which such person shall, at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit."

Now, I apprehend, the words "for his own benefit" mean no more than "for his own use:"—they mean in truth "not as a trustee." It was argued, in reference to the 1st section of the 6 & 7 Will. 4, c. 104, which empowers the council of a

borough to execute from time to time any deed or obligation to secure repayment and satisfaction of any debt or obligation contracted before the passing of the Municipal Corporation Act, that the power so given was a power to be exercised by the council as they should think fit, with due discretion, with proper regard to the number of debtors who might be in a similar position with reference to antecedent debts, and in fact, with proper regard to all matters to be submitted to them for their deliberation, and further, with due regard to that public trust, which, since the passing of the Municipal Corporation Act, had become fastened upon every body corporate. It appears to me, even assuming for the purpose of this discussion that I am bound to follow the decision of the Judges in *Arnold v. Ridge*, and that the former statute, the 5 & 6 Will. 4, c. 76, left the creditor remediless, that still, when the subsequent statute, the 6 & 7 Will. 4. c. 104, enacts, that, notwithstanding the former statute, the body corporate shall have full power to execute any deed for securing repayment and satisfaction of any debt or obligation contracted before the passing of that former Act, the sound and literal construction of the subsequent statute 6 & 7 Will. 4, c. 104, is, that the Legislature intended thereby to place corporations, as to bona fide debts contracted before the passing of the Municipal Corporation Act, precisely in the same position in which they stood before the passing of that Act, giving them all the powers and authorities which they then possessed of making such charges as they might think fit, for the purpose of securing any debts antecedently contracted for their own use. If so, the power so given by the statute 6 & 7 Will. 4, c. 104, is to all intents and purposes a power to be exercised by the body corporate "for its own benefit." It is true, it is not in one sense for the benefit of the body corporate itself that it has the power, but I apprehend the only proper meaning of a power which a person may exercise "for his own benefit" is such a power as any

1856.

ARNOLD
v.
THE MAYOR
&c. OF
GRAVESEND.

Judgment.

1856.
 }
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Judgment.

owner of property might exercise in the character of owner. This is a power which the body corporate might exercise as owner. It is therefore a power which it might exercise "for its own benefit," within the meaning of the Act 1 & 2 Vict. c. 110, and, by the 13th section of the Act, the judgment operates as an execution of the power, and the creditor has the benefit of the charge.

I cannot part with the case without considering the 92nd section of the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, and the decision of the Court of Common Pleas in the case of *Arnold v. Ridge* (a). As I said before, I should have had great difficulty in disposing of this case, unless it had seemed to me that I might fairly do so, even assuming that decision to be correct,—at least I should have had great difficulty in disposing of it without the assistance of some of the Common-law Judges; but, with regard to the decision in *Arnold v. Ridge*, I must say, after giving it the most careful consideration, that I cannot come to the conclusion at which the learned Judges arrived in reference to the 92nd section. The construction they put upon the 92nd section is this: they say the 92nd section provides, that, after the election of the treasurer, "the interest, dividends, and annual proceeds of all moneys, dues, chattels, and valuable securities" (which of course would include all choses in action, stock in the funds, and the like) belonging to the body corporate, are to be paid to the treasurer, and all the moneys which he shall so receive, are to be carried by him to the account of the borough-fund, "and such fund, subject to the payment of any lawful debt due from such body corporate to any person, which shall have been contracted before the passing of the Act, and unredeemed, or of so much thereof as the council of such borough from time to time shall be required or shall deem it expedient to

(a) 13 C. B. 745.

redeem, and to the payment from time to time of the interest of so much thereof as shall remain unredeemed," (I will omit for the present the saving clause which follows), "shall be applied" in a particular way there mentioned. Now, taking that clause as I have read it, the interpretation put upon it by one of the learned Judges of the Court of Common Pleas and acquiesced in by at least another is, that it was meant to apply to mortgage debts alone. It is important to observe this circumstance in reference to the proviso at the end of the 92nd section, because the interpretation seemed in a considerable degree, as it appears to me, to lead to the construction which was afterwards put by the Court upon that proviso, viz. that it refers to the saving clause which follows the direction that the fund is to be subject to the payment of all lawful debts, and not to that direction itself. I do not know that the attention of the learned Judges was called to the case before Lord *Cottenham* (a), referred to in the case in the Court of Queen's Bench (b), and in which a different view was taken, although merely obiter with reference to the 92nd section, and it was supposed to have the effect of making the borough fund subject to *all* lawful debts. With regard to the inference drawn by the Court of Common Pleas from the occurrence in the 92nd section of the words "redeem" and "unredeemed" in reference to the debts in question, it is not an uncommon phrase to apply to a bond to speak of it as being "redeemed" or "redeemable." In many instances it will be found to be provided, when tenders are made to corporations, that the bond shall be "redeemable" at such a time by lot; and I cannot help thinking that the construction is somewhat narrow which restricts the words "any lawful debt" to debts charged by way of

1856.
 ARNOLD
 v.
 THE MAYOR
 & C. OF
 GRAVESEND.
 Judgment.

(a) *Attorney-General v. Aspinall*, 2 My. & Cr. 613.

VOL. II.

(b) *Holdsworth v. The Mayor of Dartmouth*, 11 A. & E. 490.

Q Q

K. J.

1856.
ARNOLD
v.
THE MAYOR
&c. OF
GRAVESEND.
Judgment.

mortgage. The words "any lawful debt" appear to me to include bond debts and the like which form no special charge, and if so, the circumstance of such a construction being possible would at once account for the proviso at the end of the 92nd section, which provides "That nothing in this Act contained shall be construed to render liable to the payment of any debt contracted before the passing of this Act by any body corporate any part of the real or personal estate of the said body corporate, which before the passing of this Act was not liable thereto." The early part of the 92nd section had provided that the borough fund should go to certain purposes, subject to the payment of all such debts as are there mentioned. That might be construed as creating a charge of all such debts upon the borough fund. No, says the proviso at the end of the section, you shall not charge any debt upon any property upon which it is not charged before. In other words, a bond debt or the like, which can only be recovered by execution, shall not touch property which might possibly be held, by force of those words "subject to the payment of any lawful debt, &c.," to be payable out of all the funds of the corporation.

I come now to the saving clause; and it is upon this that I confess I have not been able distinctly to follow the view of the learned Judges. The words are these, "saving all rights, interests, claims, or demands of all persons or bodies corporate in or upon the real or personal estate of any body corporate by virtue of any proceedings either at law or in equity, which have been already instituted, or which may be hereafter instituted, or by virtue of any mortgage or otherwise." A creditor might have a claim against a corporation, which, by proceedings at law thereafter to be instituted, might become a right against the estate real and personal of the corporation; and that such debts were in-

tended, I think is obvious, for the clause speaks of rights, interests, claims, or demands by virtue of any proceedings at law or in equity, "or by virtue of any mortgage or otherwise." And so far I have the decision of the learned Judges in accordance with my own view of the construction, every one of those learned Judges having held that the clause enabled any anterior creditor to take proceedings to enforce his rights against the land of the corporation, unless such rights were affected by the subsequent proviso at the end of the section. The Lord Chief Justice, after reading the saving clause, says:—"If the clause had stopped there, it might have created a fund out of which a debt due from the old corporation might have been levied; for, it expressly saves the rights of those who had rights over the property out of which in part the fund is to be raised. I think it does mean to give an execution against the property of the corporation to creditors who have a right to enforce it; and that it would give to a person who was a creditor of the corporation before the passing of the Act, a remedy against property acquired by the corporation since the passing of the Act." So far, I have the decision of the learned Judge entirely in accordance with my own view. I only differ from him in this respect, that I should not have said that the 92nd section "gives" a remedy to a person who before the passing of the Act was a creditor; but that it "saves" (for that is the word used in the statute) such remedy. That distinction it will not be unimportant to observe upon afterwards. Then Mr. Justice *Maule's* judgment is to the same effect. He says, "The saving is general in its terms. The remedy was to be unlimited as to debts contracted since the passing of the Act" (that, evidently, must be a misprint for "*before* the passing of the Act") "and for that purpose it was necessary to have a general saving. But it was considered not right that the old creditors should have recourse to anything but the old property of the

1856.
 ARNOLD
 v.
 THE MAYOR
 &C. OF
 GRAVESEND.
 Judgment.

1856.
 {
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Judgment.

borough." And he says in a previous part of his judgment, "If that saving had stood alone, it would have followed that the old creditors, though at the time their debts were contracted the corporation possessed no property, would, by means of the machinery of the new Act, be able to enforce payment of their debts." He says, it saves them all their rights anterior to the Act against everything acquired or to be acquired, as soon as they recover a judgment. And Mr. Justice *Cresswell* says, "The first part of the 92nd section requires all the rents and profits, &c., to be paid to the treasurer of the borough, to be carried to the borough fund. That would apply as well to all newly acquired property of the corporation as to property which it possessed before the passing of the Act: and it might well be supposed that such a provision would protect all the property against the execution of a creditor: therefore it was thought necessary to introduce the saving clause upon which the Plaintiff relies." Then he says—and this seems to be conclusive as to the construction—"As the first part of the section applied to *all* property, the saving required to be equally extensive, and apply to all debts whether contracted before or after the passing of the Act. But, lest it should be supposed that this saving was intended to give the old creditors the benefit of having recourse to after-acquired property, the proviso at the end is introduced." But I ask, when the statute only "saves" rights, why should we say it "gives" them?

The learned Judge, after having said that the right is *given* by the 92nd section, proceeds to say that the Legislature, having *given* this right, was apprehensive that the future acquired property would be affected; and therefore they passed the further proviso at the end of the section, that nothing in the Act contained shall be construed to render liable to the payment of any debt contracted before the passing of the Act by any body corporate any part of

the real or personal estate of the said body corporate, which before the passing of the Act was not liable thereto.

It seems to me that this proviso never could apply to the saving clause. I should have thought it impossible successfully to contend that a saving would give any further right than the party already had. "Saving" means that it saves all the rights the party previously had, not that it gives him any new rights; and it seems to me impossible to say, that a proviso, that nothing in an Act contained shall be construed to render liable to the payment of any debt property which was not liable before, can have any application to a mere saving clause contained in the Act.

On the other hand, the proviso in question has an immediate and satisfactory application to the previous clause, which enacts that the borough fund is to be subject to the payment of any lawful debt contracted before the passing of the Act. The borough fund being by that clause made subject to such debts, unless there had been this proviso at the end of the section, it might have been inferred that stock, copyholds, &c., were to be subject to such debts, where no judgment could attach. It seems to me that the proviso at the end of the section was inserted with the simple view of meeting that very case, and I adopt entirely the learned Judge's view, that the saving does save to the creditor all the rights he had before. I do not suppose that the Legislature would be desirous of depriving a creditor of any right which he previously had, though it would not be very unjust to tell him, that, with regard to future-acquired property, he should be put to his diligence and should have only what he had got already.

All the learned Judges agree that the saving is general, and applies to all property, whether acquired after or before

1856.
 ARNOLD
 &
 THE MAYOR
 &c. OF
 GRAVESEND.
Judgment.

1856.
 {
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Judgment.

the passing of the Act. But where I venture to differ from them is, in their application of the proviso at the close of the 92nd section to the saving clause; whereas I apply it to the anterior clause "subject to the payment of any lawful debt;" and if I am right in so applying it, the proviso in question would have no effect upon the saving clause.

The learned Judges observe, that it would be obviously unjust, when the Legislature intended to hand over property to a public trust, to hold that the creditor should have a remedy upon after-acquired property, which he did not possess at the time of the passing of the Act. But the borough fund, as contemplated by the Act, was composed of the existing property. Future property could only be acquired by a corporation in one of two ways: either by using its own property or by way of gift, and there is nothing strange in the supposition that the Legislature intended that a corporation owing debts (whether it takes by bounty or otherwise) shall provide for all the old debts before it does anything further.

Having a strong conviction upon the question, I have felt it right to express it, although I do so with that hesitation which one ought to feel when opposed to four Judges as competent, or more so, to form an opinion on the subject. At the same time, I feel that I am not necessarily interfering with the decision of those learned Judges. Although their judgment may stand, I may still hold that the Plaintiff in this case has a right to have his debt paid out of the after-acquired property.

Decree.
 —

THIS Court doth declare, that the Plaintiff's judgment, dated the 19th of March, 1852, in the pleadings mentioned, is a charge upon all lands, tenements, rectories, advowsons, tithes, rents, and hereditaments, (including lands and hereditaments of copyhold or customary

tenure), as well those acquired since as before the passing of the Act of the 5 & 6 Will. 4, intituled "An Act to provide for the Regulation of Municipal Corporations in *England and Wales*," of or to which the Defendants, the mayor, aldermen, and burgesses of the borough of *Gravesend* were, at the time of entering up such judgment, or are now or shall at any time hereafter become seised, possessed, or entitled, for any estate or interest whatever at law or in equity, whether in possession, reversion, remainder, or expectancy, or over which the said Defendants had, at the time of entering up such judgment, or have at any time since, or have now or shall at any time hereafter have, any disposing power, which they might, without the assent of any other person, exercise for their own benefit; and doth also declare, that such judgment ought to stand as a security for the payment to the Plaintiff of interest at the rate of 5*l.* per cent. per annum upon the ten several sums of 100*l.*, making together 1000*l.*, secured to the Plaintiff by the mortgages or assignments numbered from 21 to 30 both inclusive in the pleadings mentioned, now due, and hereafter to accrue due, to the Plaintiff; And it is ordered, that the following accounts and inquiry be taken and made (that is to say):—

1856.
 {
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 —
Decree.

1. What lands, &c. (ut supra) the said Defendants were at the time of the entering up such judgment, and have at any time since, or are now seised, possessed, or entitled of or to either at law or in equity, and what estate or interest they have therein respectively, and whether the same are subject to any, and if any, what charges or incumbrances prior to the Plaintiff's said judgment.

2. An account of what is due to the Plaintiff for arrears of interest on the said ten said several sums of 100*l.* each, secured by the said mortgages and assignments, with interest at the rate of 4*l.* per cent per annum on such arrears from the times when the same respectively became due and payable, and for his costs of this suit, to be taxed as hereinafter mentioned; and also for his costs at law of and occasioned by the action brought by the said Plaintiff against the said Defendants, and the final judgment recovered therein as mentioned in the said pleadings, and also by the subsequent proceedings from time to time taken by the said Plaintiff against the said Defendants in and about suggesting upon the roll in the said action the nonpayment of the arrears of interest as breaches of the condition of the said bond in the said pleadings mentioned.

And it is ordered, that it be referred to the proper Taxing Master of this Court to tax the Plaintiff his costs of this suit; And it is ordered, that the mayor, aldermen, and burgesses of the borough of *Gravesend* do pay the amount that shall be certified to

1856.
 ARNOLD
 v.
 THE MAYOR
 &c. OF
 GRAVESEND.
 ———
Decree.

be due to the Plaintiff for principal, interest, and costs, upon taking such account as aforesaid, to the Plaintiff, within six months after the Chief Clerk shall have made his certificate, at such time and place as shall be thereby appointed. But in default of the Defendants so paying to the Plaintiff what shall be certified to be due to him for principal, interest, and costs as aforesaid by the time aforesaid, it is ordered, that a sufficient part of the lands, &c. charged with the said judgment as aforesaid, be sold under the direction of the Judge to whose Court this cause is attached, subject to all charges and incumbrances thereon prior to the Plaintiff's said judgment, if any such there be. And it is ordered, that the money to arise from such sale be paid into the Bank with the privity of the Accountant-General of this Court, to be there placed to the credit of this cause, that the same may be applied in payment of what shall be certified to be due to the Plaintiff for principal, interest, and costs as aforesaid. And in the meantime it is ordered, that a proper person be appointed to receive the rents and profits of all the lands, &c. of or to which the said Defendants, the mayor, aldermen, and burgesses of the borough of *Gravesend* are seised, possessed, or entitled. And it is ordered, that out of such rents and profits the Receiver do pay to the Plaintiff interest at and after the rate of 5*l.* per cent. per annum upon the said ten several sums of 100*l.*, by equal half-yearly payments on the 16th day of April and the 16th day of October, in every year, or until the further order of the Court, the first payment to be made on such of the said days as shall first happen next after the Chief Clerk shall have made his certificate. And it is ordered, that the Receiver be allowed the said payments in passing his accounts, and pay the balance which shall be certified to be due from him into the Bank with the privity of the said Accountant-General, to be there placed to the credit of this cause. And it is ordered, that the further consideration of this cause be adjourned; and any of the parties are to be at liberty to apply to this Court as they may be advised.

1858.

IN THE MATTER OF THE 10 & 11 VICT. c. 96;

April 6th &
7th.

AND

IN THE MATTER OF THE TRUSTS OF THE WILL
OF JOSEPH WRIGHT, DECEASED.

JOSEPH WRIGHT, by his will, dated in 1811, bequeathed to trustees a sum of 4500*l.*, Navy Annuities, in trust to pay the dividends thereof to his son *William Wright*, for life, and, after his death, to transfer the capital unto and equally among all and every the child and children of the said *William Wright*, which should be living at the time of his decease, who being a son or sons should attain the age of twenty-one years, or depart this life under that age leaving issue, or being daughters or a daughter should attain that age or marry, to be divided between or amongst such children, if more than one, in equal shares.

*Domicil—
Putative Child
—French Law
—Legitima-
tion.*

A domiciled *Englishman*, being the putative father of an illegitimate child, born in *France* of a *French* woman, and afterwards becoming domiciled in *France*, cannot, on his subsequent marriage with the mother of the child, legitimatise the child under the provisions of the *French* law, so as to enable it to share in a bequest to his children contained in the will of a person in *England*.

The testator died in 1814.

William Wright, in 1801, being an *Englishman* domiciled in *England*, married *Mary Hanburgh*, and had by her seven children. His wife died in February, 1821. After her death in 1823, *William Wright* went to *France*, under the circumstances stated in the judgment in this case,

tained in the will of a person in *England*.

The reasons for this are—

1. That marriage, being a personal contract, is like other personal contracts regulated by the law of the domicile of the party.
2. That the law of the domicile of the putative father attached to the child at its birth, and by that law its bastardy was indelible.
3. That, by the law of *France*, a bastard cannot afterwards be made legitimate, if, at the time of its conception, the parents were incapable of contracting to legitimatise the child after its birth, and a domiciled *Englishman* could not bind himself by such a contract.
4. That, by the law of *France*, a bastard can never be made legitimate if it is uncertain who was the father: and a domiciled *Englishman* by the law of this country cannot, for civil purposes, be more than the putative father of a bastard child.

1856.
 In re
 WRIGHT'S
 TRUST.

Statement.

and there cohabited with *Florentine Melanie Roger*, of whom, in December, 1824, was born a daughter, who was the reputed child of *William Wright*.

Subsequently, at *St. Omer*, he went through a ceremony of marriage with the mother of the child before an *English* clergyman not duly authorised to celebrate marriages abroad.

On the 23rd of August, 1841, a ceremony of marriage between *William Wright* and *Florentine Melanie Roger*, according to the *English* form, was celebrated at *Paris* before the chaplain to the *British* Embassy there.

On the 19th of November, 1846 (a), *William Wright* intermarried with *Florentine Melanie Roger* in *Paris*, in manner prescribed by the *French* law, and endeavoured to legitimatise her said child, by acknowledging her in the mode prescribed by the law of *France*.

He died at *St. Maude* on the 5th of December, 1854, leaving only two of the children of his first marriage, and the daughter of his second wife, surviving him; the other five children of the first marriage having died without issue.

The two children of his first marriage claimed the whole of the legacy, and, on the other hand, the daughter of the second wife claimed to be entitled to one-third share of it.

The trustees paid the fund into Court under the 10 & 11 Vict. c. 96, and cross petitions were now presented by the claimants to have it paid out to them.

Argument.

Mr. *Rolt*, Q. C., and Mr. *Surrage*, for the elder of the two

(a) NOTE.—For the purposes of time domiciled in *France*. See this report it must be assumed the judgment, *infra*, p. 602. that *William Wright* was at this

surviving children of *William Wright* by his first marriage:—

The children of *William Wright* by his first marriage are alone entitled to this legacy. If not, then, as a similar power of legitimatising children exists in *Scotland*, an *Englishman* might have a bastard there, then marry an *English* wife and have a family by her, and afterwards marry in *Scotland* the mother of the bastard, and make such bastard legitimate; and the consequences of such a state of the law would be frightful.

In *Kerr v. Martin* (a), it seems even to have been held in *Scotland*, that the mother of a bastard there, though she had married another person not the father of the bastard, and had by such husband several children, might, after his death, by marriage with the bastard's father, render the bastard legitimate. That case was cited in *Shedden v. Patrick* (b), where a domiciled *Scotchman* having a bastard child in *America* subsequently intermarried there with the mother of such child, and the question was, whether such child was thereby legitimatised so as to enable him to succeed to his father's property, and it was decided, that the child was irreversibly an alien from his birth, and therefore could not hold land in *Scotland*. In *Collier v. Rivas* (c), an *Englishman* domiciled in *Belgium* executed a testamentary instrument there, not according to the formalities of the *Belgian* law; but it appears that, notwithstanding this, the *Belgian* law recognised such will, and it was admitted to probate in *England*. In *Birtwhistle v. Vardill* (d) Lord Brougham observes, in giving his opinion, "that a person may be legitimate for all other purposes, and yet incapable of taking land by descent." And the decision in that case was, that a bastard legitimatised by the law of *Scotland* could not take as heir of his

1856.
In re
WRIGHT'S
TRUST.
Judgment.

(a) 1 Macq. 650, n.
(b) Id. 612.

(c) 2 Cur. 855.
(d) 7 Cl. & F. 955.

1856.
 In re
 WRIGHT'S
 TRUST.
 —
Argument.

father lands in *England*: *Anstruther v. Chalmer* (a), *Price v. Dewhurst* (b).

Mr. Willcock, Q.C., and Mr. Karslake, for the other child of the former marriage:—

Cited also *Lloyd v. Lloyd* (c), where a person whose domicile of origin was unknown, having obtained a domicile in *France*, and having afterwards married there a *French* woman, was held by the *French* tribunals to have established between himself and his wife the *communauté des biens*, so that his personal property was divided among his children, some of whom were born before marriage, equally; *Munro v. Munro* (d), where these questions are said to depend mainly on the domicile of the father at the time of the conception, birth, and marriage of the child.

The domicile of the father attaches to the child at the moment of its birth; and if it be then incapable of being legitimatised by the law of such domicile, no change of domicile afterwards can alter that: *Munro v. Saunders* (e), Story's *Conflict of Laws*, p. 938, *Shedden v. Patrick* (f), where Lord *St. Leonards* observes, "Lord *Redesdale* says it is stated, that the decision of this case, in the year 1808, was because the child was born an alien—and then proceeds to ask, 'why was he born an alien?' Because the law of *America* touched him at his birth, and the retrospective effect of the law of *Scotland* could not alter that character which at his birth attached upon him."

Then the intention of the testator who made this will must be taken to be to give a benefit only to those children

(a) 2 Sim. 1.

(b) 8 Sim. 279; 4 My. & Cr. 76.

(c) 13 Beav. 401, n.

(d) 7 Cl. & F. 876.

(e) 6 Bligh, N. S. 468.

(f) 1 Macq. 632.

of *William Wright* who would be legitimate according to our law: *Watts v. Shrimpton* (a).

Mr. *W. M. James*, Q. C., and Mr. *Waller*, for the daughter of Mr. *Wright* by his *French* wife:—

This is a question of the construction of a will, on what principle it is to be determined who are to take by the description of children of *William Wright*? Are they only to be such persons as come under the denomination of children in the country where the will was made? Suppose a *Scotchman*, having a family of children, some of whom were legitimatised by his marriage subsequent to their birth, became domiciled in *England*, would not they be as much his children here as they were in *Scotland*?

[They cited, in addition, *The Strathmore Peerage case* (b), *Rose v. Ross* (c), and *Lord Nelson v. Lord Bridport* (d).]

Mr. *Rolt*, Q. C., in reply.

Judgment deferred.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Joseph Wright bequeathed by his will the sum of 4000*l.* to the children of his son *William*, who should be living at the time of his death, and the question is simply, who are entitled under that description. At the time of his death there were two legitimate children of *William*, and the difficulty is created by the claim of a third person to share with them. This third claimant is a lady who was born in *France*, the offspring of a connexion between *William Wright* and a *French* lady, whom he married twenty years after the birth of this child. It is contended, that, by the

1856.
In re
WRIGHT'S
TRUST.
Argument.

May 7th.
Judgment.

(a) To be reported, 21 Beav.

(b) 4 Wils. & S., App. 89.

(c) 4 Wils. & S. 289.

(d) 10 Jur. 1043.

1856.

In re
WRIGHT'S
TRUST.

Judgment.



effect of that marriage, the claimant became legitimate, and that, therefore, she is entitled to partake in this legacy with the other two legitimate children.

The facts, which seem to me to be established, are, that *William Wright* was an eccentric person, that his domicil of origin was *English*, that he went, at an early period of his life, to *Scotland*, that he married there, and there is no evidence of his having lost, at this time, his *English* domicil. He returned to *England*, and had an establishment here, and was living here with his wife at the time of her death. She died in 1821, and at this time he still retained his domicil of origin. It appears, that, upon the death of his wife, he was distressed at finding himself considerably involved in debt. His income was very small, his property consisting chiefly of a life estate of 200*l.* or 300*l.* a year, and on the death of his wife he was astonished to find debts of which he was ignorant during her life, as she had managed everything for him. In consequence of the discovery he broke up his establishment, assumed a feigned name, and went abroad to *Dunkirk* to avoid his creditors for a time, but with the honourable intention, which he ultimately fulfilled, of paying off his debts, as he should be able to do so. In July, 1823, he thus went to *France*, and there he became acquainted with the mother of the claimant; and the claimant was born in such time afterwards as made it probable that he was her father—in the month of December, 1824.

The first question which I had to consider was, what was the domicil of *William Wright* at the time of the birth of the claimant; and I think that it is clear that, at the times of the conception and of the birth of this lady, the domicil of her putative father was *English*. The evidence on this point, except one single fact which is somewhat loosely stated, is all one way.

It is proved, that the cause of his leaving *England* was his being involved in debt, and that those debts were not paid off until 1836; and there is no evidence of any declaration of intention to alter his domicile until 1832 at the earliest, when he went to *Paris*; and certain conversations which he held there with a friend about returning to *England*, are proved. He lived for a time at *St. Omer*, where he went through a ceremony of marriage with the mother of the claimant, which was ineffectual, before an *English* clergyman; but that shews that he considered himself to be at that time *English*. At *Dunkirk*, he lived for a time in lodgings and became a teacher there; and the only fact which is in evidence to rebut the presumption of his domicile being *English*, is, that he took a house, which he was to occupy, at his option, for four or five years, at a rent of 500 francs, and which he gave up in the fifth year. I think, therefore, that there is no necessity for further inquiry on this part of the case. I assume, in favour of the claimant, that the house was so taken, though the evidence on that point is not very distinct; but, on the other hand, his debts in *England* were still unpaid, and he was living on the coast of *France* as though in a temporary exile only. He had not yet removed to *Paris*, but had only taken a house for a period which he might consider would suffice to enable him to discharge his debts in *England*. There is therefore no evidence that his domicile was other than *English* at the times of the conception and birth of the claimant.

It was not until the year 1832, a considerable time after her birth, that he went to live at *Paris*; and then there is some evidence of his having intended to establish himself in *France*, and to make that country his domicile; and it was this that made it necessary for me to consider my judgment.

If *William Wright* had remained a domiciled *English*-

1856.
In re
WRIGHT'S
TRUST.
Judgment.

1856.
In re
WRIGHT'S
TRUST.
—
Judgment.

man, it would have been clear that the *English* law must have been applicable as well at the birth of the claimant as at the subsequent marriage of *William Wright* with her mother, and no legitimisation could have taken place. The difficulty is occasioned by a conflict of evidence with reference to the domicil of *William Wright* from a period anterior to the marriage; and for the purpose of my judgment, to prevent the necessity of further inquiry, I have been obliged to assume, that, at the time of such marriage, *William Wright* had acquired a *French* domicil.

[His Honor here noticed the evidence, which, he observed, left this point in doubt.]

He went through a ceremony of marriage in 1841, at the *British Embassy*, and in 1846 he married the claimant's mother according to the *French* form. He died in 1854, and in this state of facts the question for me to determine is, whether an *Englishman* leaving this country and going to *France*, and there having an illegitimate child by a *French* woman, of which he was, as we should say, the putative father, afterwards becoming domiciled in *France*, and then contracting a marriage, first at the *British Embassy*, and subsequently according to the *French* form, with the mother of such child can, under such circumstances, legitimise the child so as to enable it to take by that description with his other legitimate children under a gift to his children generally in an *English* will.

That being the state of the case, I shall first consider how the courts of *France* and *England* respectively deal with such cases, relating to persons who are clearly domiciled subjects of the country before whose tribunals the case has to be determined.

Some points are clearly settled.

any evidence to contradict or strike out of the will the description of the charity as being in *London*, unless it were first proved that no charity existed in *London* which could answer the description, and that there was in some other place a society which did strictly answer the description in the will. At least it should be shewn that there was a society elsewhere to which the name given in the will was peculiarly appropriated, and no society to which that name could be applied in *London*. Even if brought as high as that, there would be considerable difficulty in admitting the evidence. In *Miller v. Travers* (a) a testator devised all his estates in the county of *Limerick* and in the city of *Limerick*, having no estates in the county of *Limerick*, but having estates in the county of *Clare*, and a small real estate in the city of *Limerick*; and the Court refused to admit evidence to prove that the devise was intended to include estates in the county of *Clare*, but that, by a mistake of the draftsman, they had been omitted.

In this case there are, it seems, several societies in *London* which are popularly called Clergy Societies, and it is shewn that the secretaries of two of them, namely, *The Society of the Sons of the Clergy* and *Friends of the Clergy* have received letters, one or two of which, perhaps, out of a thousand mention one or other of these societies as *The Clergy Society*, and in some the secretary is addressed as secretary to *The Clergy Society*. There is no evidence of a similar fact with respect to *The Society for the Relief of Poor Pious Clergymen*, but that society might well have acquired the name of *The Clergy Society*: it is a society for the benefit of the clergy.

I consider that I am obliged to look to the institutions in *London*, and to hold that the testatrix intended to benefit some one of them; and, accordingly, I must exclude from the

1856.

In re
THE CLERGY
SOCIETY.
Judgment.

(a) 8 Bing. 244.

1856.
 In re
 THE CLERGY
 SOCIETY.

Judgment.

benefit of this bequest that charity called *The Clergy Charity*, which carries on its business in another locality and not in *London*.

Upon the evidence, indeed, I am not satisfied that the testatrix, by the description in her will, did intend to refer to this charity, which is constantly designated in the memoranda produced as a charity locally situate in the diocese of *Gloucester*; but, whether this be so or not, I am bound, in point of law, to look for a charity answering the terms of this bequest, which carries on business and has its offices in *London*.

There are three charities now claiming the legacy: as to one of these, "*The Society for the Relief of Poor Pious Clergymen of the Established Church residing in the Country*," there is no evidence making it probable that this was the charity intended. There is nothing to shew that it was brought to the notice of the testatrix. As to *The Friend of the Clergy Corporation*, there is the evidence of the Rev. *George Campbell*, who states that he knew the testatrix and her late husband, and had many conversations with them with reference to this charity; and "in such conversations they evinced a deep and earnest interest in the welfare and success of the said *Friend of the Clergy Corporation*, and expressed their intention to render it assistance; but they did not nor did either of them state in what particular mode such assistance could be rendered." It appears that neither the testatrix nor her husband in any way subscribed to or aided this society in their lifetime. The charity was only founded in 1849. It is not stated at what time the conversations to which I have referred took place. Mr. *Grooby*, it is worthy of remark, did not give anything by his will to this charity, but left all to his wife. Therefore, the case made in favour of this charity is under this disadvantage, namely, that the same intentions as were expressed by

the testatrix, are represented to have been expressed also by her husband, and on his part they resulted in nothing. Mr. *Campbell* goes on to say, that he continued on terms of friendship with Mrs. *Grooby* until her death; and that he frequently called her attention to this charity, and that whenever he alluded to it in her presence, she always expressed a deep and earnest interest in its prosperity and welfare. He does not say, that, after the death of her husband, there was any further evidence of an intention on her part to benefit this charity; he says, that when both were living they did express such an intention, but that the husband died, and had not carried that intention into effect; that, afterwards, he had conversations with the testatrix, and that she expressed a deep interest in the welfare of the charity, but he does not say that she spoke again of her intention to benefit it. That is very weak evidence from which to conclude that this was the charity intended by the will.

1856.
 In re
 THE CLERGY
 SOCIETY.
 Judgment.

With respect to *The Sons of the Clergy Charity*, there is nothing to enable me to decide in their favour. The evidence as to them is, that, in 1854, shortly before the date of this will, they held their bi-centenary festival, and sent out 9000 circulars throughout the country; and it is certainly probable that the attention of the testatrix might thus be attracted to this charity.

The other charity now before me is, as I have observed, locally situate in the diocese of *Gloucester*, and to this the husband of the testatrix was a subscriber. It is called *The Clergy Charity*, and was founded, according to the evidence before me, in imitation of *The Sons of the Clergy Society*, and its object is the relief of the widows and orphans of clergymen and distressed clergymen or their families in the diocese of *Gloucester*. There is in the will of the testatrix a gift to *The Clergy Orphan Society*, which is a similar charity in *London*. These circumstances, however, afford

1856.
 In re
 THE CLERGY
 SOCIETY.
 Judgment.

but weak evidence to prove that it was the intention of this lady to benefit this particular charity.

Then it was suggested, that the bequest must be considered void for uncertainty, because no object can be found to answer the description. In the case before the Lord Justice *Knight Bruce*, there was a gift to a charity in *Middlesex*; and there being none which exactly answered the description, it was held, that the Court had authority to direct a scheme; and, in this case, this legacy being preceded by a legacy to *The Church Building Society*, and followed by legacies to *The Church Missionary Society* and to *The Clergy Orphan Society*, I think there is sufficient on the face of the will to shew that the testatrix meant to confer a charitable benefit on the clergy of the Church of *England*. It has been argued, that it must be intended for the clergy themselves, and not for their widows or families, and three of the societies before me provide for all these objects; but it seems reasonable to hold, that a charitable bequest, intended for distressed clergymen, should extend to what is unfortunately the commonest form of distress among them, the destitution of their widows and children.

The right course seems to me to be, to direct a scheme for the application of this fund in *London*; the testatrix has specified that locality, though she has not sufficiently defined the object of the gift. The Attorney-General must be served with the petition, and then it must be mentioned again. He may even be able to suggest some charity which may fully answer the description.

The costs of all parties must come out of the fund.

On the petition being mentioned on a subsequent day, in the presence of the Attorney-General, a scheme was directed to be made for the application of the legacy cy pres.

1856.

GOUGH v. DAVIES.

June 2nd.

WILLIAM DICK, by his will dated the 3rd of June, 1796, gave and bequeathed to trustees 7000*l.*, 4*l.* per Cent. Bank Annuities, upon trust, to apply the dividends thereof for the support, maintenance, and education of his granddaughter *Caroline Amelia Dick*, until she should attain the age of twenty-one years, and then upon trust to pay into her proper hands the dividends of the said sum of 7000*l.* Bank Annuities for her separate use, and after her decease then upon trust for all her children as therein mentioned; and in case she should not have any child, or having such every such child should die under the age of twenty-one years and without having been married, then the said testator declared his will to be that the said 7000*l.* Bank Annuities should be transferred to and vested in his grandson *William Dick*, if he should be living at the time of the decease of his said granddaughter, but if not, then upon trust for such person or persons respectively as at the time of her decease should be the testator's next of kin.

Convict—Conditional Pardon—5 Geo. 4, c. 84, s. 26.

A pardon granted to a felon under the sign manual has not the effect of a pardon under the Great Seal. The 5 Geo. 4, c. 84, s. 26, protects felons whose sentences have been remitted by the Governor of the penal colony, in the enjoyment of property subsequently acquired by them, not only by their own industry, but also by other means.

The testator died shortly after the date of his will.

William Dick, the grandson, died on the 14th of May, 1839.

Caroline Amelia Dick, the granddaughter, intermarried with the Rev. *John Davies*, who died in or about the year 1828.

The said *Caroline Amelia Davies* died on the 7th of April, 1855, without issue.

The next of kin of the testator at the time of her death

So, where a convict who had received a conditional free pardon subsequently became entitled, as one of a class which could not be previously ascertained, to a share of personal property bequeathed by a will made long before the date of his conviction:—*Held*, he was entitled to retain this share against the Crown.

1856.
 GOUGH
 v.
 DAVIES.
 Statement.

were *James Gough*, *John Gough*, and *Alexander Dick Gough*, all of whom were still living.

On the 13th of May, 1812, *James Gough* was convicted of felony, and sentence of death was recorded against him, which was commuted to transportation for life. He was transported accordingly to *New South Wales*; and on the 1st of February, 1841, the Governor of that colony, under the Commission given to him by the King pursuant to the Act of the 30 Geo. 3, c. 47 (a), granted to the convict a

(a) The 30 Geo. 3, c. 47, s. 1, provides, that his Majesty, his heirs and successors, by commission under the Great Seal, may authorise the Governor of a penal colony, by an instrument in writing under the seal of the government of such colony, "to remit, either absolutely or conditionally, the whole or any part of the time or term for which any such felons or other offenders aforesaid shall have been or shall hereafter be respectively conveyed and transported to such place or places as aforesaid, and that such instrument or instruments shall have the like force and effect to all intents and purposes as if his Majesty, his heirs and successors, had, in such cases respectively, signified his or their Royal intention of mercy under his or their sign manual."

The 4 Geo. 4, c. 96, s. 34, reciting the last-mentioned statute, enacts, "That all instruments made in conformity therewith before the 1st day of January then next, should have, within *New South Wales* and its depen-

dencies, the effect of a general pardon under the Great Seal, including the names of the convicts whose sentences the Governor had so remitted."

And sect. 35 enacts, that all such instruments in future should be transmitted to his Majesty, his heirs and successors, for his and their approbation and allowance; and when so approved, "every such instrument so transmitted as aforesaid shall have and shall be deemed and taken, from the date thereof, *within New South Wales and the dependencies thereof, but not elsewhere*, such and the same effect in the law to all intents and purposes as if a general pardon had passed under the Great Seal aforesaid on the days of the dates of such instruments respectively, in which the names of such felons or offenders had been included."

The 5 Geo. 4, c. 84, s. 26, on which the question in this case turned, is as follows:—

"And whereas it hath sometimes happened that felons un-

remission of the remainder of his punishment, upon condition "That the said *James Gough* do and shall quit the colony of *New South Wales* and its dependencies at any time when he shall be required by the Governor so to do. And if the said *James Gough* shall fail well and truly to keep and perform the said condition, then this instrument shall be void and of no effect, and the said *James Gough* shall be exposed to all the penalties of the original sentence."

1856.
GOUGH
v.
DAVIES.
Statements.

der sentence or order of transportation in *New South Wales* and the islands adjacent have received from the Governor or Lieutenant-governor thereof remissions, either absolute or conditional, of the whole or of some part of the term of their transportation, and have by their industry acquired property in the enjoyment whereof it is expedient to protect them, and the like may happen in future in the same colony and in other colonies to which felons may be transported under and by virtue of this Act; Be it therefore enacted, that it shall and may be lawful for every felon under sentence or order of transportation, who hath received or shall receive any such remission as aforesaid from the Governor or Lieutenant-governor of any other colony, who may be authorised to grant the same, while such felon shall reside in a place where he lawfully may reside under such sentence, order, or remission, and under the provisions of this Act, to maintain any action or suit for the recovery of any property, real, personal, or mixed, acquired by such felon since his or her conviction, and for any

damage or injury sustained by such felon since his or her conviction, not only in the courts of the colony or place where such felon shall lawfully reside, but also in the Courts of this Kingdom, and of all other his Majesty's dominions; and if the defendant in any such action or suit shall plead or allege in his defence the plaintiff's or complainant's conviction of felony, and the plaintiff or complainant shall allege and prove that he or she hath received such remission as aforesaid, and is residing in some place consistent therewith and with the provisions of this Act, a verdict shall pass and judgment shall be given for the plaintiff or complainant."

The 6 Geo. 4, c. 25, s. 1, enacts, that the performance of the condition in case of a conditional free pardon granted by the Crown under the sign manual, and countersigned by the Secretary of State, shall have the effect of a pardon under the Great Seal. And see a similar provision in the 7 & 8 Geo. 4, c. 28, s. 13. The 2 & 3 Will. 4, c. 62, s. 2, limits the time at which such pardons may first be granted.

1856.
 GOUGH
 v.
 DAVIES.
 —
Statement.

On the 30th of March in the same year, the Governor of the said colony sent the name of the said *James Gough* to her Majesty's Government in *England*, as a person recommended for absolute pardon; and her Majesty signified her gracious intention to approve and allow such pardon; and on the 8th of March, 1842, this was accordingly notified in the *Sydney Gazette*.

Argument.
 —

Mr. Rolt, Q. C., and Mr. Cairns, Q. C., for *James Gough* :—

By the effect of these pardons, *James Gough* is entitled to retain his share of this property as against the Crown. In *Stokes v. Holden* (a), where a felon to whom a legacy was left on a contingency had undergone all his punishment before the contingency happened, it was held that he was entitled to the legacy, though it would have belonged to the Crown if it had accrued due to him before the term of punishment had expired: *Roberts v. Walker* (b), *Bullock v. Dodds* (c). But in this case both the conditional free pardon of the Governor and the absolute pardon of the Crown had been granted before the convict became entitled to this property.

The effect of the pardon is shewn by *Cuddington v. Wilkins* (d), where a felon who had been included in a general pardon was held capable of suing, and recovered in an action on the case against the Defendant for calling him a thief: *Newsome v. Bowyer* (e).

Mr. Wickens for the Crown :—

By a conditional free pardon the attainder of a convict is not removed during his life, nor is it a total remission of the

(a) 1 Keen, 145.

(b) 1 Russ. & My. 752.

(c) 2 B. & Ald. 258.

(d) Hob. 81.

(e) 3 P. Wms. 37.

sentence : *Bullock v. Dodds* (a), *Re Church* (b). The whole question turns on the construction of the 5 Geo. 4, c. 84, s. 26, which relates only to property *acquired* by industry.

1856.
 GOUGH
 v.
 DAVIES.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think the case turns upon the construction of the 5 Geo. 4, c. 84, s. 26, and that a liberal construction ought to be given to it, as it is intended to enlarge a benefit conferred by the previous statute upon convicts who should have earned, by their good conduct, a Governor's pardon. Upon the first point that was raised, however, I think it would be very wrong to allow any doubt to be thrown upon the decision of *Bullock v. Dodds* (a). It has been argued, that a pardon, although not under the Great Seal, but under the Privy Seal and sign manual, operates as a complete remission of all the consequences of the attainder, and restores all the rights of property to the convict. Now *Bullock v. Dodds* (c) deals with that very question, and *Abbott, C. J.*, in his judgment in that case says, "The intention of mercy signified under the sign manual has not the legal effect of a pardon under the Great Seal; and, in general, a pardon under the Great Seal does not, without words of restitution, enable the grantee to sue upon an obligation which had vested in the King by his attainder."

Judgment.

As to *Newsome v. Bowyer* (d), it is to be explained upon the doctrine, that, on attainder, the party becomes civiliter mortuus, and therefore could not claim as husband his wife's property; and that, consequently, the Crown could not put in a claim to property which had never vested in the husband.

(a) 2 B. & Ald. 258.

(b) 16 Jur. 517.

(c) 2 B. & Ald. 258.

(d) 3 P. Wms. 37.

1856.
GOUGH
v.
DAVIES.
—
Judgment.

The question is entirely upon the statutes as to the effect of a pardon in the penal colony. At first, only a limited effect was given. The Governor was empowered to pardon convicts in a qualified manner, so that such pardon should take effect only in the colony. Afterwards it was provided, that he should send to the Government in *England* a list of names of persons to be pardoned from time to time, and these persons were to have pardons under the Great Seal. Now, the names are transmitted to the Secretary of State, and he forwards them to her Majesty, who graciously intimates her approval; and the effect of such a proceeding is regulated by the 5 Geo. 4, c. 84, s. 26, upon which the question in this case wholly turns. [His Honor read the preamble of that section (*a*)]. The preamble seems to represent the design to be, to protect convicts in the possession of property which they have acquired by their industry. [His Honor read the rest of the section.] The statute might certainly have been more clearly expressed. It has been suggested, that if it was intended to confer every civil right, that might have been distinctly provided. I am not sure that this was the intention. There may remain certain rights which the convict so pardoned does not regain, and as to which he is not protected. Previously to this Act, convicts had not, by law, any property real or personal. It was found by experience, that many of them became industrious persons, and acquired property by their industry; and it was thought desirable that they should be protected in the enjoyment of property so acquired. I think the plain construction to be put upon this statute is, that its object was to protect convicts, who evinced a disposition to become industrious, in the possession of property acquired by them either by their industry or otherwise. It is reasonable to suppose that such protection would be expedient, in order to encourage them in their improved course of life.

(*a*) See note, p. 624.

This difficulty arises if any narrower construction be given, namely, that persons who wish to oppose their claim to the particular property would plead that it was not obtained by industry; and the inquiry, whether it was or not, would be attended, in some cases, with the greatest uncertainty; and thus it would sometimes happen that the very scope and object of this section, as expressed in the preamble, would be interfered with. A reformed convict might wish to engage in business, and benevolent persons might be desirous to assist him by giving him stock in trade; and, according to the narrower construction suggested, if part of that property should be taken from him, he would not be able to maintain an action for it, to say nothing of the difficulty and hardship of a case in which the goods taken were partly the fruits of a man's own industry, and partly given to him by the benevolence of others.

1856.
 GOUGH
 v.
 DAVIES.
Judgment.

The property in question, in this case, has come to the convict since his conditional pardon, not as the fruit of his industry, but simply from the circumstance of his being one of the next of kin of the testator at the death of *Mrs. Davies*. If I consider that the statute extends to any property beyond that which may have been acquired by the industry of the convict, I can draw no distinction between the different modes by which it may have come to him. I must adhere to the literal expression of the enacting part of the statute, and decide that, as this is property acquired since the period referred to by the statute, he is entitled to hold it, and to sue for it if necessary.

1856.

May 1st.

IN THE MATTER OF THE TRUSTS OF THE WILL
OF PETER SOWERBY.

*Will—Gift for
Creditors in
Bankruptcy—
Lapse.*

A testator, who had been bankrupt, and had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved and not paid in full in the bankruptcy, and directed his executors to pay to the official assignee in the bankruptcy, in trust to pay all such creditors so much money as would make the dividend in the bankruptcy equal to 20s. in the pound:—*Held*, that the benefit thereby intended to be conferred on a creditor did not lapse by his death in the testator's lifetime.

PETER SOWERBY, by his will, dated in 1851, appointed *Martin* and *Williamson* his executors; and the will contained a bequest in the following terms:—

“ I direct my just debts to be paid, in which I include the unpaid in full debts proved on the estate of *Peter Sowerby* the elder and *Peter Sowerby* the younger, in a commission of bankruptcy issued against the said *Peter Sowerby* the elder and *Peter Sowerby* the younger, in or about February, 1822. *Thomas Avison*, of *Liverpool*, was then the solicitor to the commission. I hereby will and direct my aforesaid executors and trustees, within three years from the date of my decease, to pay unto the official assignee of the aforesaid bankrupt estate, or to some authorised person to be appointed by the High Court of Chancery, in trust to pay all the aforesaid creditors who have proved their debts in the aforesaid commission, so much money as will make the dividend on the aforesaid estate equal to 20s. in the pound on all the debts so proved; no interest thereon to be allowed or paid.”

The testator was one of the bankrupts mentioned in the will, and had long since obtained his certificate in the bankruptcy.

One of such creditors had himself become bankrupt, and had subsequently died in the lifetime of the testator. The question was, whether his interest under the bequest had lapsed.

Mr. Cairns, Q. C., for the assignee of the deceased creditor, argued, that this gift was not in the nature of a legacy to each individual creditor, but was a bequest of a sum to the assignee in the bankruptcy of the testator, to be applied for the benefit of the creditors. He cited *O'Connor v. Haslam* (a), and *Philips v. Philips* (b), where a testator, by his will, dated in 1825, bequeathed his residuary personal estate to trustees, upon trust, to divide the ultimate surplus of the proceeds thereof "unto and amongst the several persons who were my creditors at the time I made and executed a conveyance of my estate and effects for their general benefit in or about the month of October, 1802, their respective executors and administrators . . . , excepting out of such calculation the debt due to my late brother *William Philips*, or his administrator;" and it was held that the representatives of creditors who had died in the testator's lifetime were entitled to share.

1856.
In re
SOWERBY'S
TRUST.
—
Argument.

Mr. Rolt, Q. C., and Mr. Bazalgette, for the executors.

The question is, is this a legacy or a debt? if a legacy, it must have lapsed by the death of the legatee in the testator's lifetime. It cannot be a debt, because all the debts in the bankruptcy were extinguished by the certificate; and that constitutes the chief difference between this case and those which have been cited. [VICE-CHANCELLOR.—A bequest to the official assignee, in the bankruptcy, in trust to pay the debts, would be good.] Not if the cestui que trust died in the lifetime of the testator. In *Coppin v. Coppin* (c), it was held, that legacies to creditors of the amount of debts which they had previously released were mere voluntary gifts, like any other legacy; and in *Williamson v. Naylor* (d), where representatives of deceased creditors were held entitled, the

(a) 5 H. L. Cas. 170.
(b) 3 Hare, 281.

(c) 2 P. Wms. 295.
(d) 3 Y. & C. Exch. 206.

1856.
In re
SOWERBY'S
TRUST.

debts had not been in any way discharged. Then, here the testator intended a personal benefit to each of the creditors, and not to the assignee of any who might have become bankrupt, or to the Crown if any were felons.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I do not say that this will is wholly free from difficulty; but I think that the intention is so manifest, that the difficulty is solved.

What occasions the difficulty is, that the bequest is in the nature of bounty, for the debts are actually barred by a certificate in bankruptcy; and therefore, whatever the creditors in the bankruptcy take under this gift must be by the gift of the testator, and they could not come in competition with his own creditors at his death. Then, to whom is the gift made? A direction to the executors to pay all the debts in bankruptcy which were unpaid, would be a valid gift in law. The question is, whether the intention is the discharge of this moral duty, or whether the testator merely intended a bounty to the creditors individually. If the will had stopped at the first clause, there would have been no question. The words there are, "I direct my just debts to be paid, in which I include the unpaid in full debts proved on the estate of *Peter Sowerby* the elder and *Peter Sowerby* the younger, in a commission of bankruptcy issued against the said *Peter Sowerby* the elder and *Peter Sowerby* the younger, in or about February, 1822."

If there had been solely this direction, the executors would have been bound to find out what debts there were. They could not be debts in one sense, because they were discharged; but the executors would be bound to find them out and to take care that that they were satisfied in full. The testator,

however, proceeds to say, "I direct my aforesaid executors and trustees, within three years from the date of my decease, to pay unto the official assignee of the aforesaid bankrupt estate, or to some authorised person to be appointed by the High Court of Chancery"—So far, the object was simply to save his executors trouble, by putting it in a proper channel to have the estate administered as in bankruptcy; and then come the words which create the embarrassment, "in trust to pay all the aforesaid creditors who have proved their debts in the aforesaid commission, so much money as will make the dividend on the aforesaid estate equal to 20s. in the pound on all the debts so proved."

1856.
In re
SOWERBY'S
TRUST.
Judgment.

I remark, in the first place, that the reference to the aforesaid creditors is not very exact. The testator had not previously named any creditors, and the aforesaid creditors means no more than what he had before said, namely, that he wished all his debts to be paid; and therefore, I am justified in reading this as though he had said, "I wish that there should be paid to the official assignee such a sum of money as will make up a certain dividend on all the debts which have been proved." I think that this is the effect of his words, taking into consideration his clear desire to have all the debts established in the bankruptcy provided for, as expressed in the first part of the clause, and also the direction that payment should be made to the official assignee, or to some other trustee appointed by the Court of Chancery to pay the dividends to such creditors. It is a bounty no doubt, but it is given with an expression of a desire on the part of the testator, which ought to be taken into consideration, that full justice should be done in respect of all that was left unpaid at the time of the bankruptcy. There being this manifest intention on the part of the testator that all his debts should be paid, the question is, whether it is possible to conceive that the testator's sense of

1856.
In re
SOWERBY'S
TRUST.
—
Judgment.

justice in the matter would be satisfied by depriving of their shares any of the creditors who might have died in the interval between the bankruptcy and his own death, especially as the will was made thirty years after the bankruptcy, as appears upon the face of it. I cannot conceive that this was the testator's intention.

I consider that this is a legacy to the official assignee of so much money as would make up a dividend of 20s. in the pound to all those creditors who have proved their debts.

The other difficulties do not much affect my mind. In the case of the creditors who are dead, the assignee will hold the dividend in trust for their representatives. And with respect to the suggestion, that some creditor might since have become a felon, I cannot suppose that the testator had at all considered or cared how, in such a case, the Crown might adjust its claim. I quite admit the distinction between this case and the authorities cited, but I hold this to be a good bequest to the official assignee for the purpose stated.

One is, that the law of the domicile follows a person to another country, and if he marry in a country which has a different law as to marriage from that of the country of his domicile, the marriage must be celebrated indeed according to the law of the country where he resides, but its effect is regulated by that of his domicile. In other words, these questions of marriage and status are another form of the doctrine now well settled, that as regards all personal contracts the law of the domicile must prevail.

1856.
In re
WRIGHT'S
TRUST.
Judgment.

It has long been settled in *France*, according to *De Conty's case*, referred to in *Munro v. Munro (a)*, that, if a domiciled *Frenchman* has a child born to him in *England*, and subsequently marries the mother, the law of *France* prevails, and the child may be made legitimate. That was followed in *Munro v. Munro (b)*, which was the decision of the House of Lords sitting as a *Scotch Court of Appeal*, and determined that a domiciled *Scotchman* having had a child by an *English* woman and having subsequently married her, the law of *Scotland* applied and the child was made legitimate.

On the other hand, the converse doctrine is equally well settled, that, if a person affected by the law of *England*, having an *English* domicile, were to have a child by a woman in *France* and afterwards married her in *France*, the child could not thereby be made legitimate, but the law of *England* would apply to the transaction.

I must then inquire whether the case which I have now to consider has ever occurred for decision, where the father was domiciled at the birth of the child in *England*, and at his subsequent marriage with the mother was domiciled in *France*. I can find no such case. *Lloyd v. Lloyd (c)* was of a different description, because there the domicile of the

(a) 7 Cl. & F. 876.

(b) Id. 842.

(c) 13 Beav. 401, n.

1856.

In re
WRIGHT'S
TRUST.

—
Judgment.

father at the time of the birth of the child was uncertain and the Court seems to have held, that, as his domestic origin was uncertain, he must be taken at the birth of the child to have been domiciled in *France*; and there was a case of a person who had a *French* domicile, to whom a child was born before marriage, and it followed of course, that such child could be legitimatised upon subsequent marriage.

Upon principle, then, what is the law of *France* as to legitimisation of children upon a subsequent marriage with the mother? I disregard at present the particular forms required by the Code for this purpose. There have been many decisions in *France* which have cleared the ground of some questions which still remain uncertain by the law of *Scotland*. The *Roman* law proceeded wholly upon the assumption that the subsequent marriage was evidence of a contract entered into at the time of the connection, of which the child was the fruit; and according to that law there was a great difficulty in the way of legitimisation, if, between the birth of the child and the marriage of the parents, either had entered into another marriage. The view which is taken of the question by *Merlin* in his *Repertoire de Jurisprudence* is, that in such a case, legitimisation was impossible by the *Roman* law. The *French* law has got rid of this difficulty. *Pothier*, in his *Traité du Mariage*, pt. v. ch. 2, as to the effect of a subsequent marriage with the father of the bastard, says: "La fiction de cette rétroaction back to the period of the conception of the child, says: "La fiction de cette rétroaction n'est pas absolument nécessaire pour la légitimation; il suffit qu'on puisse favorablement supposer que, pendant le commerce que les parties ont eu ensemble, elles ont eu le commerce en vue du mariage qu'elles se proposaient de contracter: que l'une des parties a depuis changé de dessein en se mariant à une autre personne; mais qu"

la dissolution de ce mariage, elles ont enfin exécuté leur premier dessein."

1856.
 In re
 WRIGHT'S
 TRUST.
 Judgment.

But it is very important again to go back to the theory, that it must rest upon contract in some way or other. Originally the *Roman* law seems to have founded it on a much more intelligible principle, namely, that there was an inchoate contract, which, when perfected by marriage, was drawn back to the period of the commencement of the contract, and so the child was made legitimate; but that an intermediate marriage intercepted this, and in effect put an end to the contract.

It is clear, that it was treated as a contract both by the *Roman* and *French* law, for these laws distinguished the case where the parties at the period of their original intercourse were not in a position which rendered them capable of marrying, and in such case the child could not be made legitimate. For instance, if the man were married to another woman at the time of the conception of the child, though his wife died before its birth, the child could not be legitimatised; so, if the man were in priest's orders, and in numerous other cases. If there were any disability to contract a marriage between the parties, the child could not afterwards be made legitimate.

Another point stated by *Merlin* to be decided is, that, if any such disability existed, the same effect would be produced though the other party was entirely ignorant of such disability, as, if the man were married and the woman was totally unconscious of that fact, the child could not be made legitimate. That shews that the law must depend wholly upon the theory of a contract. But for this last case, there might be some doubt whether it did not depend in some degree upon the immorality of the transaction. Some of

1856.
In re
 WRIGHT'S
 TRUST.
 Judgment.

the authorities do mention that as a reason, but it cannot be so if the rule is the same where one of the parties is totally ignorant that the intercourse was adulterous.

Another point determined by the law of *France* is, that although the party may, at the time of the subsequent marriage, recognise the child as his own, yet if it can be shewn that the child was not his, or that it was a matter of doubt, the legitimisation does not take place. This is laid down in *Merlin's Repertoire de Jurisprudence*, Art. Legitime, p. 37 (a), the case of *Antoine Salnove*, where it is stated that he declared, "qu'à l'égard des deux enfans qu'il a reconnus il croit y avoir bonne part," leaving it to be inferred that they might be the children of others.

(a) La reconnaissance même la plus authentique n'opérerait rien en faveur des enfans, et le mariage ne les légitimerait pas, s'il était prouvé qu'ils n'ont pas pour père celui qui les reconnaît pour sien au moment où il épouse leur mère. Voici une espèce qui s'est présentée à ce sujet au Parlement de *Paris*.

En 1652, il naît du marquis de *Termes* et de *Marie Laurent*, un bâtard, que l'on baptise sous leurs noms : *Antoine Salnove* en est parrain.

En 1661, *Antoine Salnove* épouse *Marie Laurent*, et déclare dans le contrat de mariage que les deux enfans dont on vient de parler sont de lui. Aussitôt son père et sa mère se pourvoient devant l'officiel, pour faire déclarer ce mariage nul, attendu l'alliance spirituelle qu'avait contractée *Antoine Salnove* avec sa prétendue femme, en tenant sur

les fonds de baptême l'enfant né d'elle et du marquis de *Termes*.

Dans le cours de la procédure, *Antoine Salnove* et sa femme sont interrogés sur le fait de savoir si celle-ci n'a point eu d'autres mauvaises habitudes. *Antoine Salnove* répond que depuis le temps de son mariage, il ne croit pas que sa femme ait eu affaire à d'autre qu'à lui ; et qu'à l'égard des deux enfans qu'il a reconnus, il croit y avoir bonne part. Quant à la femme, elle dit qu'elle n'est tenue de répondre de ces faits qu'à son mari, et qu'il en sait la vérité.

Après d'autres procédures qu'il est inutile de détailler ici, et une réitération solennelle du mariage, en vertu d'une dispense du Pape, sentence intervient au châtelet, qui confirme à *Marie Laurent* la qualité de veuve d'*Antoine Salnove*, et ordonne que les extraits baptismaires des

Now the state of the *English* law on the subject is to some extent clear. As to children born in wedlock, ever since the decision in *Birtwhistle v. Vardill* (a), it has been acknowledged that the Statute of *Merton*, 20 Hen. 3, though in terms confined to an inheritance in land, is declaratory of the law as it then existed ; and that, according to the *English* law, a child not born in wedlock is *filius nullius* ; and it is impossible for an *Englishman*, as long as he remains subject to the laws of *England*, to render such a child legitimate. The offspring of any woman not married cannot be attributed to any particular father in *England* except for certain criminal purposes in bastardy. There is no connection between the father and the child, and nothing done by the father afterwards can improve the condition of the child.

Then the question arises, whether this law is to be applied

1856.
In re
WRIGHT'S
TRUST.
Judgment.

enfants nés en 1654 seront réformés sous le nom de ce dernier.

Mais sur l'appel des héritiers collatéraux, arrêt du 13 février, 1664, conforme aux conclusions de M. l'Avocat-Général Talon, qui, faisant droit sur le chef de la sentence, qui ordonne la réformation des extraits baptis-taires, met l'appellation et ce dont est appel au néant ; émettant maintient les appelans en possession des biens d'*Antoine Salnove* ; la sentence au surplus sortissant son effet.

Les motifs de cet arrêt ont été, que *Marie Laurent* s'était constamment prostituée à plusieurs, puisque le marquis de *Termes* en avait eu un enfant en 1652, et que les enfants nés en 1654 devaient encore être présumés du même père, puisque leurs extraits baptis-taires étaient

conçus en son nom ; qu'enfin *Antoine Salnove* n'avait pas dit dans son interrogatoire que ces enfants étaient de lui, mais seulement qu'il y avait eu bonne part, ce qui signifiait que d'autres pouvaient y avoir contribué aussi bien que lui. Toutes ces circonstances réunies l'ont emporté sur la déclaration faite au contrat de mariage, et cette décision est très judicieuse : "car il se trouve des hommes tellement aveuglés et abandonnés dans le désordre, que pour complaire à une femme prostituée, ils adopteraient pour ainsi dire, par un mariage subséquent, des enfans de toutes sortes de conjonctions, ce qui serait d'une dangereuse conséquence dans le public."

(a) 7 Cl. & F. 895.

1856.
 In re
 WRIGHT'S
 TRUST.
 Judgment.

to the child of an *Englishman* residing in a foreign country, and having a child born to him of a woman in that country; and this point, to a certain extent, is a novel one. It was not determined in *Shedden v. Patrick* (a). There, on the question in the first case, it was assumed that the domicile of the party was *American*, and thereupon all the consequences followed necessarily, and of course the child would be illegitimate, because it was so by the law of the country where his father was assumed to be domiciled. In the second case of *Shedden v. Patrick* (a), the Court, for the purpose of considering whether there was any fraud in suppressing the fact that the domicile was *Scotch*, assumed that it was *Scotch*, and then the Plaintiff was an alien unless he could avail himself of the statutes which enact that the child of a natural-born *English* subject is an *English* subject, though born out of the jurisdiction; and therefore, the question to be determined was, what was the paternity of the child, and whether he was born of an *English* father; and it was held that he was not, and the reason for that was, as expressed by Lord *Redesdale*, because at the moment of his birth the *American* law touched him, and at his birth it could not be said that he was the child of an *English* father. Lord *Brougham*'s view was, that, admitting that the law of the domicile must be followed, the effect of a *Scotch* marriage is not to render a child previously born legitimate ab initio, looking to the circumstance of the possibility of an intermediate marriage, and the mischievous consequences of holding the child to be rendered legitimate ab initio, and therefore the law would touch him at his birth, and having once taken effect he is an alien, and that is indelible. That does not necessarily involve the indelibility of bastardy. It might be held that the comity which one nation extends to another would not reach this state of alienage. The state would claim its subject. The question of the in-

(a) 1 Macq. 612.

delibility of bastardy, therefore, did not come into consideration in that case; but it was a good deal discussed in *Munro v. Munro (a)*, and observations were made in that case by Lord *Cottenham*, which are very important. In p. 873, he is reported to have said, "If a domiciled *Scotchman* be in the habit, for business or pleasure, of passing part of his time beyond the border, and some of his children are born within and some without the limits of *Scotland*, can it be the law that a subsequent marriage should legitimatise some only of his children, and leave the rest illegitimate? It has been assumed in argument that any of such children born in a country which allowed legitimation per subsequens matrimonium would be legitimate in *Scotland*, but not if born in *England* or in any other country which did not recognise such legitimation. This argument is founded upon the supposed indelibility of bastardy, and seems to have its origin in the circumstance of some very learned persons having used expressions applicable to *English* law upon a question of purely *Scotch* law. If *English* parents have a child born in another country, could the legitimacy of such child in *England* be affected by the law of such country? The effect of a *Scotch* marriage must be judged of with reference to *Scotch* law; and that law not only does not admit the doctrine of the indelibility of bastardy, but, on the contrary, holds that no bastardy is indelible unless the parents were, at the time of the birth, incapable of marrying. If, therefore, the law of *England* be imported into the consideration, the effect of the *Scotch* marriage is judged of not by the law of *Scotland*, but by the law of *England*. In this view of the law of *Scotland*, all the learned Judges of the Court of Session, with the single exception of the Lord President, concurred; and he founded his dissent upon the rule of the law of *England* as to the indelibility of

1856.
 In re
 WRIGHT'S
 TRUST.
 Judgment.

(a) 7 Cl. & F. 842.

1856.

In re
WRIGHT'S
TRUST.

—
Judgment.

bastardy, and upon expressions of *English* lawyers. But he adds, 'in the case of *Rose v. Ross*, I stated, in my opinion, that I would not take the law from such an extreme case as that of a woman taken suddenly, and perhaps prematurely in labour, whilst travelling in *England* with or without her paramour, and brought to bed of a bastard there, and then returning with it, on her recovery, to *Scotland*. That is an extreme case, and what might be the law as to it we must endeavour to settle when the case occurs.' Beyond all doubt, a child so born would be affected with indelible bastardy in *England*, and if that is to regulate his status in *Scotland*, the peculiar circumstances referred to would not make an exception in his favour."

Those observations are very important as shewing Lord *Cottenham's* view to be, that a domiciled *Scotchman* carries with him into another country the law of *Scotland*, as to all personal contracts into which he may enter. If he have a child born in *England*, the place of its birth has nothing to do with the law of its domicile.

In the case before me, no importance can be attributed to the fact of the mother being a *French* woman. A domiciled *Englishman* having a child before marriage in any part of the world by a woman of any other nation, the legitimacy or illegitimacy of that child must be determined by the law of his domicile. How can such a question be affected by the law of any other country in which the child may happen to be born. The importance of *De Conty's case* and *Munro v. Munro* (a) is, that they decide a doubt which seems to have been floating in the minds of several Judges of eminence, as to whether the place of birth did not affect the domicile of the child.

In *Munro v. Munro*, the Lord President in the court

(a) 7 Cl. & F. 842.

below said, that he could not conceive what the law of the domicile had to do with it, the child was born in *England*, and of whatever country the father might be could not make any difference. He was born in a country in which a child born out of wedlock is a bastard. That was an error which had been dealt with long ago by the *French* courts, and their decision was recognised in *Munro v. Munro* (a); and Lord *Cottenham* says, applying that to the case of *English* parents who have a child born in another country, its domicile of origin must be the same as that of its parents. That seems also to have been kept in view in Lord *Redesdale's* observations in the first case of *Shedden v. Patrick* (b). He assumes the father to be domiciled in *England*; and in *The Strathmore Peerage case* (c) he says, "My Lords, I apprehend that that is the true ground of the decision—he was an alien, and that character could not be altered by the retrospective effect of the law of *Scotland*; so I apprehend that this child was born illegitimate according to the law of the country in which he was born, according to the condition of his mother of whom he was born, and according to the state of his father, who was, at the time, a person unquestionably domiciled in *England*." Everything there concurred. He was born in *England* of an *English* mother, and his father was domiciled in *England*. In *Munro v. Munro* (a), the converse was the case. The place of the birth and of the marriage were immaterial, the domicile was material.

1856.
In re
 WRIGHT'S
 TRUST.
 Judgment.

Merlin, in his *Questions de Droit*, Art. *Légitimation*, p. 171, gives his view of the law in this manner. He asks, "Quel est, en France, l'état d'un enfant naturel né en Angleterre, d'un Anglais et d'une Anglaise que se seront mariés dans leur patrie après sa naissance?" And to this question he answers, that, of course, the *French* courts

(a) 7 Cl. & F. 842. (b) 1 Macq. 532. (c) 4 Wils. & S., App. 94.

1856.
 In re
 WRIGHT'S
 TRUST.
 Judgment.

would hold such child to be illegitimate ; then he asks, what would be the state of such an illegitimate child born not in *England* but in *France* ; and concludes, that it must equally be illegitimate, and that is the only point on which there might be some doubt, except for *Munro v. Munro* (a), which has settled that question. It has been contended, that there is a difference between a child born in a country where bastardy is indelible and where it is not, and here the child was born in *France*, where there is no such indelibility ; but if the law of the father's domicil is to apply, the case is identical with that of an *English* parent having a child before marriage in this country by a *French* woman, and attempting afterwards, by a marriage in *France*, to render that child legitimate. On every point of principle, the law of the father's domicil having fastened on the child, I am driven to this dilemma : If the child be legitimate, it is the child of one who, at its birth, was a domiciled *Englishman* ; but if that is admitted, and it is conceded that the child was born before marriage, it must be illegitimate, for it has no father by the *English* law, and nothing can afterwards establish any relationship between the putative father and the child.

Again, placing the legitimacy on the foundation of a contract at the conception, the *French* lawyers hold, that if there is any obstacle at the time of the conception of the child it can never be made legitimate ; and as a contract that the child should be afterwards rendered legitimate by marriage, could not be entered into by a domiciled *Englishman*, the child must necessarily be illegitimate, and must belong to the mother, and it would be immaterial that she was ignorant of that legal obstacle. So again, looking to those other cases in which it has been held that the courts in *France* will not allow a child to be rendered legitimate where it is uncertain who the father was, and as the *English* law says,

(a) 7 Cl. & F. 842.

that in the case of the child of an unmarried woman the father never can be ascertained, it therefore follows, that, even according to the *French* law, the child in this case could not be made legitimate. This case, therefore, seems to me to be concluded by the current of authorities, especially since the decision in *Munro v. Munro* (a), and I must hold this lady to be illegitimate. [His Honor then observed that the formalities required by the *French* law for the legitimisation of the child did not seem to have been duly observed, as there had not been a proper recognition of the child by *both* the parents ; and he continued :—] It is said that the marriage in 1844 was not a valid marriage ; but though the father was domiciled in *England*, the Act of Parliament, 46 Geo. 4, c. 91, enables him to marry at the *British* Embassy, and has no reference to the wife being an *Englishwoman* or a foreigner ; and I must hold that marriage to have been good. If so, the recognition of the child was not then made. There may be a conflict of laws in all cases depending on positive statute, as if an *Englishman* were to marry his former wife's sister in *France*, such marriage could never make her his lawful wife, though by the *French* law such marriages are valid. Those are conflicts of law which cannot always be avoided.

I will mention one or two of the extreme inconveniences which would result if the law were otherwise than as I have held it to be. If a domiciled *Englishman*, being the putative father of an illegitimate child, could afterwards legitimatise such child, the consequences would be most serious, because the doctrine must apply not merely to children by a foreign woman. But if he had children by a foreign or an *Englishwoman* and afterwards domiciled himself in *France*, he could then, by marriage, make them all legitimate. Suppose, as here, that a bequest was made by the will of

1856.
In re
WRIGHT'S
TRUST.
—
Judgment.

(a) 7 Cl. & F. 876.

1856.

In re
WRIGHT'S
TRUST.

—
Judgment.

some third person to A.'s children, by our law such a gift takes effect in favour of legitimate children only. The testator may have known that the father of the objects of his bounty had, besides his legitimate children, six or seven illegitimate children, and that these would not be included. Is the father of them, by a subsequent marriage in *France*, to give them the capacity to share in the benefit of the bequest? It may be said, that similar results follow in *France* and in *Scotland*; but then, that is by the law of those countries, and testators are aware of that law. Why is a testator in *England* to assume that the parent of his legatees may introduce illegitimate children to share with them, which he could not do by the law of this country?

It seems to me that such consequences would be extremely serious and little suited to the law of this country; and I think, as Lord *Cottenham* says in *Munro v. Munro*(a), the question in such cases must be, can the legitimisation of the children be effected in the country in which the father is domiciled at their birth, for their legitimacy must be decided by the law of that country once for all.

(a) 7 Cl. & F. 842.

1856.

IN THE MATTER OF THE CLERGY SOCIETY;

June 7th.

AND

OF THE 10 & 11 VICT. c. 96.

MARY GROOBY, late of *Swindon*, in the county of *Wilts*, widow of the Rev. *James Grooby*, who died in March, 1854, made her will in 1855, containing, among others, the following bequests:—

Will—Charitable Bequest—Extrinsic Evidence—Cy pres.

“ I give and bequeath to the following societies or institutions, *established or carried on in London*, the several legacies or sums next hereinafter mentioned; (that is to say), to *The Church Building Society* the sum of 2000*l.* 3*l.* per Cent. Consolidated Bank Annuities, to *The Clergy Society* the like sum of 2000*l.* like Annuities, to *The Society for Promoting Christian Knowledge* the like sum of 2000*l.* like Annuities, to *The Church Missionary Society* the sum of 1000*l.* like Annuities, and to *The Clergy Orphan Society* the sum of 2000*l.* like Annuities; and my desire is, that, if I should not be possessed of a sufficient amount of 3*l.* per Cent. Consolidated Annuities at the time of my death to answer and pay the said several legacies and specified amounts of stock, my executrix shall purchase or make up the same out of my residuary personal estate hereinafter bequeathed. And I direct the said several amounts of stock to be paid or transferred to the treasurers or other properly authorised officers of the said societies for the use and benefit thereof, at the expiration of twelve months after my decease.”

Bequests of sums of stock to the following societies in *London*: *The Church Building Society*, *The Clergy Society*, *The Society for Promoting Christian Knowledge*, *The Church Missionary Society*, and *The Clergy Orphan Society*. There being no society answering the description of *The Clergy Society*:—*Held*, that extrinsic evidence could not be received to prove, that, by that name, a charity not in *London* was intended.

Held, also, that a scheme cy pres must be directed, and that this must be done in the presence of the Attorney-General.

The testatrix appointed her sister her residuary legatee and executrix, who, after the death of the testatrix, not being able to satisfy herself what society was intended by

1856.
 In re
 THE CLERGY
 SOCIETY.
 —
 Statement.

"*The Clergy Society*" mentioned in the will, transferred the 2000*l.* stock bequeathed to the *Clergy Society* into Court, under the Trustee Relief Act, upon an affidavit, in which she stated, that she "had reason to think" that the society intended was "*A Society or Charity for the Relief of the Widows and Orphans of Clergymen and their Families*," within the diocese of *Gloucester*, to which the testatrix and her late husband were for many years contributors.

A petition was now presented by "*The Friend of the Clergy Corporation*" claiming the fund. This society was founded in *London* in 1849, by the name of "*The Friend of the Clergy Society*," and had since been incorporated by Royal charter. Its objects were to pension widows and orphan unmarried daughters of clergymen, and also to afford temporary assistance to necessitous clergymen and their families. It was often called "*The Clergy Friend Society*;" and letters were sometimes addressed to the secretary, as secretary of "*The Clergy Society*," and in some of such letters the society was referred to by that name. Its offices were in *London*. The circumstances which were relied on as shewing a probability that the testatrix intended to benefit this society are mentioned in the judgment.

The petition was opposed by "*The Clergy Charity*," a society existing in the diocese of *Gloucester* and *Bristol*, established in 1778, for the relief of widows and orphans of clergymen, and distressed clergymen or their families, in that diocese only. To this charity the husband of the testatrix, in his lifetime, and the testatrix after his death, were subscribers. It did not appear that this charity had any connexion with *London*, or any place of business there.

Another charity claiming the legacy adversely to the former claimants was "*The Governors of the Charity for*

the Relief of poor Widows and Children of Clergymen," a charity which was incorporated by that name, but was more commonly called "*The Sons of the Clergy*." It carried on business in *London*. Its objects were, to assist distressed clergymen of the Church of *England*, and their widows and children. It was often mentioned in letters addressed to the registrar as "*The Clergy Society*." The bicentenary festival of this charity was held on the 10th of May, 1854, in *St. Paul's Cathedral*, and about 30,000 letters and reports were circulated previously in *London* and the country, and advertisements issued in order to give to this ceremony the greatest possible publicity.

1856.
In re
THE CLERGY
SOCIETY.
Statement.

The other society which now claimed the legacy was "*The Society for the Relief of Poor Pious Clergymen of the Established Church residing in the Country*." The affairs of this society were conducted by a committee, who met monthly in the city of *London*. Its objects are explained by its name, but it extended relief, in some cases, to the widows and families of poor pious clergymen in the country.

Mr. *Rolt*, Q. C., and Mr. *Speed*, for the petitioners.

Argument.

Mr. *Kenyon* for *The Clergy Charity*.

Mr. *Pearson* for *The Sons of the Clergy Society*.

Mr. *Ware* for *The Society for the Relief of Poor Pious Clergymen*.

Mr. *Amphlett* for the executrix and residuary legatee.

The arguments are sufficiently referred to in the judgment.

1856.
In re
THE CLERGY
SOCIETY.

Argument.

The following cases were cited as to the admissibility of some of the evidence: *Delmare v. Robello* (a), *Bernasconi v. Atkinson* (b), *Re Feltham's Trust* (c).

As to what was to be done if none of the applicants sufficiently answered the description—*Bennet v. Hayter* (d), where, there being a bequest “to the Jews’ Poor, *Mile-end*,” and no such institution existing, the Master of the Rolls declared, that the legacy “ought to be applied to charitable purposes, having regard, as near as may be, to the objects intended by the said testator by the said bequest;” and there being two similar charities, neither exactly answering the description, the fund was divided between them;—and *Wilson v. Squire* (e), where the bequest was to “The Governors and Trustees of *The London Orphan Society* in the *City-road*,” for the benefit of that society; and the Master found that there was not any society or institution answering precisely the description; but there was an *Orphan Working School* in the *City-road*, with which the testator was in no way connected; and that the testator was a subscriber to *The London Orphan Asylum*, which was situate at *Clapton*, and in his lifetime avowed his intention of leaving to it a legacy; and the Master found that this was the society intended by the testator: but, on exception to his report, Lord Justice *Knight Bruce*, then Vice-Chancellor, held that the first-mentioned society was entitled to the legacy.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

Upon the words of this will containing a bequest expressly to a charitable institution, I think it is impossible to admit

(a) 1 Ves. jun. 412.

(b) 10 Hare, 345.

(c) 1 Kay & J. 528.

(d) 2 Beav. 81.

(e) 1 Y. C. C. C. 654.

1856.

TEMPEST v. TEMPEST.

ANNA MARIA TEMPEST by her will, dated in 1849, after devising her mansion-house and estate, called the *Grange*, upon certain trusts, in strict settlement, made bequests as follows:—"I give and bequeath my household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects, which, at the time of my decease, shall be in or about my said mansion-house, to the said *Edward Meynell*, *John Briggs*, and *Simon Thomas Scroope*, their executors, administrators, and assigns, in trust for the person or persons for the time being entitled to the actual possession of my said mansion-house under and by virtue of the limitations contained in this my will, so that the same may go and belong to my said mansion-house and be held and enjoyed therewith as and in the nature of heirlooms; yet so that, for the purpose of transmission, my said household furniture, plate, and other effects shall not vest absolutely in any person or persons hereby made tenant in tail male, unless such person or persons shall respectively attain the age of twenty-one years, or depart this life under that age leaving issue of his body living at the time of his decease. And I empower my said trustees, or the trustees or trustee for the time being of this my will, to decide conclusively, in case of dispute, what articles the last bequest shall be deemed to comprise. And I direct that my executors hereinafter named shall, within one calendar month

June 25th,
26th, & 27th.

Will—Codicil
—Attestation
—1 Vict. c. 26,
s. 15—Orna-
ments of Per-
son and House
—Charitable
Bequests—De-
monstrative
Legacy—Costs.

Bequest by will, dated in 1849, of an annuity to *A.* Codicil revoking other legacies and confirming the will, was signed by *A.* as an attesting witness:—*Held*, that the annuity given to him by the will was not thereby made void.

Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects, which at the time of my decease shall be in and

about my said mansion-house:—*Held*, not to include articles exclusively of personal ornament, and not adapted for the use or ornament of the house.

Bequest of charitable legacies, with a direction that they should be paid in precedence to the other pecuniary legacies out of such part of the testator's personal property not specifically bequeathed, as was by law applicable for charitable purposes. This fund being insufficient to pay all the charitable legacies:—*Held*, that, following out the principle of *Robinson v. Geldard* (3 Mac. & G. 735), the debts, and funeral and testamentary expenses, and the costs of a suit for administration, must be paid, in the first instance, out of the personal estate savouring of realty.

1856.
 TEMPEST
 v.
 TEMPEST.
 —
Statement.

after my decease, cause an inventory to be made of the said heirlooms, and place a copy of such inventory, signed by them and by the person then entitled to the enjoyment of the said heirlooms, among the muniments of title to my said mansion-house, to be kept therewith for the use and information of the person and persons who shall from time to time become entitled thereunto, and deliver another copy to the said *Edward Meynell, John Briggs, and Simon Thomas Scroope*, or such of them as shall act in the execution of this my will, to be kept by the trustees or trustee for the time being of this my will. I give and bequeath to the person or persons who, at the time of my decease, shall be the trustee or trustees of the *Roman Catholic Church* adjoining my said mansion-house, and lately erected by my dear mother, all the plate, plated articles, ornaments, vestments, organ, and church furniture, and other effects usually used in and about the said church, or the sacristy thereunto belonging, or otherwise in the celebration of the *Roman Catholic* divine service in the said church, to be held by them and the future trustee and trustees for the time being of the said church, for and towards the promotion and support of the *Roman Catholic* religion, and the decent and proper observance and performance of the rites and services thereof at and in the said church, and upon such and the like trusts as will best and nearest correspond with the trusts, powers, and provisions then subsisting or capable of taking effect of and concerning the said church, or as near thereto as the different nature of the property will admit of." The will then contained several charitable legacies, and, among others, legacies of 600*l.* each to the presidents of certain colleges, and a legacy of 600*l.* "to the said Right Reverend *John Briggs*, or, if he should die in my lifetime, then to the person who, at my decease, shall hold the office of Vicar Apostolic of the said *Yorkshire* district of *England*, or perform the chief duties now performed by the said *John Briggs* in respect of that office. . . . And I direct such

legacies of 600*l.* each to be paid to such presidents and the said *John Briggs*, or, if he should die in my lifetime, then to the person who for the time being shall hold the office of Vicar Apostolic of the said *Yorkshire* district, or perform the chief duties now performed by the said *John Briggs* in respect of that office, upon their respective receipts for the same. I give and bequeath to the said *John Briggs*, or if he should die in my lifetime, then to the person who, at my decease, shall hold the office of Vicar Apostolic of the said *Yorkshire* district, or perform the chief duties now performed by the said *John Briggs* in respect of that office, the sum of 1000*l.*; to the Right Rev. *Thomas Joseph Brown*, Doctor of Divinity, *Roman Catholic* Bishop of *Appolonia*, and Vicar Apostolic of the district of *Wales*, now residing at *Chepstow* in the county of *Monmouth*, or, if he should die in my lifetime, then to the person who, at my decease, shall hold the office of Vicar Apostolic of the said district of *Wales*, or perform the chief duties now performed by the said *Thomas Joseph Brown* in respect of that office, the like sum of 1000*l.* And to the said *William Waring*, or, if he should die in my lifetime, then to the person who, at my decease, shall hold the office of Vicar Apostolic of the said eastern district, the like sum of 1000*l.* And I direct that such three several legacies or sums of 1000*l.* each shall be severally paid to the several persons respectively to whom the same are severally and respectively given and bequeathed, upon their respective receipts for the same, who shall respectively forthwith severally invest the same respectively in such names, upon Government funds or securities of *Great Britain* and *Ireland*, or any foreign state, and vary the investment from time to time for others of the kinds above prescribed, as often as it may be thought proper, and settle the same in three several legacies or sums of 1000*l.* each, and the funds and securities for the same severally and respectively, and the several and respective interests and annual incomes, by three several deeds in writing, upon such trusts, with such powers, and

1856.
 TEMPEST
 v.
 TEMPEST.
 —
Statement.

1856.
 TEMPEST
 v.
 TEMPEST.
 ———
Statement.

in such manner as in their several and respective discretions will best and most effectually secure the payment and application of the same several and respective interests and annual incomes of the same three several sums for or towards the perpetual maintenance and support of themselves severally and respectively, and also severally and respectively of the several and respective person and persons succeeding them, or any or either of them, in the said offices of Vicars Apostolic of the said *Yorkshire, Welch*, and eastern districts, or in the performance of the chief duties now performed by them, or any or either of them, in respect of those offices; but always so that the said firstly mentioned sum of 1000*l.*, and the funds and securities in or on which the same may from time to time be invested, and the interest and annual income thereof respectively, may at all times be separately, solely, and entirely in trust, and applicable and applied, for or towards the perpetual maintenance and support of the said *John Briggs*, and every person succeeding him in the said office of Vicar Apostolic of the said *Yorkshire* district, or in the performance of the chief duties now performed by the said *John Briggs* in respect of that office, so long as he shall respectively hold such office or perform such duties, and no longer. . . . I give and bequeath to the said *Edward Meynell, John Briggs*, and *Simon Thomas Scroope*, their executors, administrators, and assigns, the sum of 5000*l.*, upon trust to lay out and invest the same in the purchase of a competent share of the parliamentary stocks or public funds of *Great Britain*, or upon Government securities in *England*, or upon the security of any company or body established by Act of Parliament or charter from the Crown, or by law allowed for charitable investments, in their own names, with power to alter and vary the said stocks, funds, and securities into others of a like nature, from time to time, as they shall think proper. And upon further trust to pay the interest and annual income of the stocks, funds, and securities, from time to time,

as and when the same shall become due and payable, in equal tenth parts or shares, to the *Roman Catholic* secular clergymen, for the time being from time to time duly appointed by the said *John Briggs*, or other the person for the time being holding the said office of Vicar Apostolic of the said *Yorkshire* district or performing the chief duties now performed by the said *John Briggs* in respect of that office, to and performing the duty and service of, at, or in ten of the poorest and most necessitous *Roman Catholic* missions, churches, or chapels in the said *Yorkshire* district, to be named in writing within twelve months next after my decease, by and at the discretion and under the hand of the said *John Briggs*, or other the person for the time being holding the said office of Vicar Apostolic of the said *Yorkshire* district, or performing the chief duties now performed by the said *John Briggs* in respect of that office, for or towards the perpetual maintenance and support of such *Roman Catholic* secular clergymen; and in default of such nomination by the said *John Briggs* or such other person as aforesaid, then to the *Roman Catholic* secular clergymen for the time being, from time to time duly appointed as aforesaid to and performing the duty and service of, at, or in ten of the poorest and most necessitous *Roman Catholic* missions, churches, or chapels in the said *Yorkshire* district, according to and in the discretion and judgment of the said *Edward Meynell*, *John Briggs*, and *Simon Thomas Scroope*, and other the trustees and trustee for the time being of this my will, for or towards the perpetual maintenance and support of such *Roman Catholic* secular clergymen. I also give and bequeath the following legacies (that is to say), to the poor of *Leeds*, in the county of *York*, the sum of 100*l.*; to the poor of *Masborough*, in the county of *York*, the sum of 20*l.*; to the poor of *Ackworth* aforesaid, the like sum of 20*l.*; to the poor of *Pontefract*, in the county of *York*, the like sum of 20*l.*; to the poor of *Burnsley*, in the county of *York*, the like sum of 20*l.*; and to the

1856.
 TEMPEST
 v.
 TEMPEST.
 Statement.

1856.
 TEMPEST
 v.
 TEMPEST.
 —
Statement.

poor of *Dewsbury*, in the county of *York*, the like sum of 20*l*. And I direct that the six last-mentioned legacies shall be respectively paid to the incumbent priests of the *Roman* Catholic churches or chapels for the time being of the respective places in favour of the poor whereof I have bequeathed the same respectively, to be distributed at their discretion, upon their several receipts for the same legacies. And I direct that the charitable bequests bequeathed by this my will shall be paid in precedence of the other pecuniary legacies hereby bequeathed, out of such part of my personal property not specifically bequeathed as is by law applicable for charitable purposes. I give and bequeath to my chaplain *Robert Thompson*, who now resides in the lodge on the east side of my said mansion-house, and his assigns, during his life, one annuity or yearly sum of 50*l*, to be paid to him by equal quarterly payments, clear of all deductions, the first quarterly payment thereof to be made at the expiration of three calendar months next after my decease I give and bequeath all the residue and remainder of the personal estate and effects whatsoever and wheresoever to which I may be entitled at my decease to the said *Edward Meynell*, *John Briggs*, and *Simon Thomas Scroope*, their executors, administrators, and assigns, upon trust to convert, collect, and get in the same, and to lay out the money to arise therefrom in the purchase of freehold hereditaments in fee simple in possession, or of copyhold or customary, or leasehold tenements, (such leasehold tenements to be held under a renewable lease or leases for lives or for years, or for a term of years absolute, whereof at least fifty years shall be unexpired), adjoining, or near to, and convenient to be held with my said mansion-house and hereditaments at *Ackworth* aforesaid, or to be acquired under this provision; and to settle, or cause to be settled, the hereditaments or tenements so to be purchased, to, upon, and for such of the uses, trusts, intents, and purposes, and subject to such of the provisions and powers herein limited or expres-

ed concerning my said mansion-house and hereditaments hereinbefore devised, as shall be subsisting, or as near thereto as may be." And the said testatrix, by her said will, appointed the said *Edward Meynell, John Briggs, Simon Thomas Scroope*, and *Robert Thompson*, executors thereof.

1856.
TEMPEST
v.
TEMPEST.
Statement.

Anna Maria Tempest, in 1854, made a codicil to her will, and thereby she revoked one bequest in her will and substituted another for it; and in all other respects she confirmed her said will. To this codicil *Robert Thompson* was an attesting witness.

Anna Maria Tempest died in 1854.

Edward Meynell, John Briggs, Simon Thomas Scroope, and *Robert Thompson*, the executors in the will of the testatrix named, all renounced probate of the will and codicil, and letters of administration with the said will and codicil annexed were granted to the Defendant *Joseph Francis Tempest*. The said *Edward Meynell, John Briggs*, and *Simon Thomas Scroope* also disclaimed all the real and personal estate, trusts, and powers in and by the said will given, or limited to or vested in them or any of them.

In 1850, the office of Vicar Apostolic ceased to exist in *England*, each such vicar being superseded by a *soi disant Roman Catholic* bishop.

The first tenant for life under the trusts of the will filed the bill in this suit to establish the will, and for administration. The Attorney-General was one of the Defendants. *John Briggs* was not a party, but leave had been given to him at the hearing to attend on some of the inquiries.

The cause now came on for further consideration.

John Briggs appeared by counsel.

1856.
 TEMPEST
 v.
 TEMPEST.
 —
Statement.

It appeared from the schedule to the Chief Clerk's certificate, that there were various articles concerning which it was doubtful whether or not they came within the terms of the bequest of the household furniture, plate, &c. One of these articles was a small portrait of a member of the family, which was richly framed, and set round with diamonds and rubies. There was also a case of medals and some jewels.

The pure personalty was insufficient to pay all the charitable legacies.

Argument.

Mr. Rolt, Q. C., and Mr. Lewin, for the Plaintiff:—

The disclaimer of *John Briggs* has deprived him of any benefit under the will, and the legacies given to him fall into the residue. At the hearing, liberty was given to him to attend upon some of the inquiries. He appears now by counsel, that must be at his own expense. The Attorney-General is also here, and sufficiently protects the interests of the charities.

[The VICE-CHANCELLOR.—The question of the disclaimer has not yet been properly raised. There is enough in the will to shew, that, in any case, there must be a scheme.]

Then the annuity given by the will to *Robert Thompson* has failed by the 1 Vict. c. 26, s. 15, because he was an attesting witness to the codicil, which confirmed and therefore republished the will. [VICE-CHANCELLOR.—That point has been decided the other way.] Yes, in *Gurney v. Gurney* (a), where Vice-Chancellor *Kindersley* decided that a legatee under the will did not lose his legacy by attesting a codicil which confirmed the will, nor did a residuary legatee by so doing lose his share of the residue, although the codicil in

fact increased that share by revoking some particular legacies. [VICE-CHANCELLOR.—I must follow that authority; I think it is reasonable. Each witness attests only the instrument to which he puts his name.]

1856.
TEMPEST
v.
TEMPEST.
Argument.

Then there is a question, which of the articles mentioned in the schedule to the Chief Clerk's certificate pass by the bequest of plate, &c. in and about the mansion-house. In a late case of *Spencer v. Spencer*, before the Master of the Rolls (not reported), the word "plate" in a will was held to pass a gold watch. *Cole v. Fitzgerald* (a) decided, that, by a bequest of "household furniture and other household effects," all property on the premises "intended for use or consumption therein, or for the ornament thereof," would pass. A gift of household goods passes plate: *Nicholls v. Osborn* (b). The word "effects" alone would carry even money. And the word "pictures" in this will must include the jewelled portrait.

Then, the pure personalty, though insufficient to pay the charity legacies, must contribute with the rest of the personal estate to pay the debts, funeral and testamentary expenses, and costs of administration, including this suit.

Mr. *Fleming* for other parties in the same interest.

Mr. *Wickens* for the Attorney-General:—

The pure personalty should not contribute to pay debts, &c. The charity legacies are demonstrative: *Robinson v. Geldard* (c); and, therefore, in case of a deficiency of assets, the particular fund appropriated to pay them would not abate, and, consequently, it cannot be made liable to debts, &c.

(a) 1 S. & S. 189; *S. C.*, affirmed, 3 Russ. 301.

(b) 2 P. Wms. 419.

(c) 3 Mac. & G. 735.

1856.
 TEMPEST
 v.
 TEMPEST.

Mr. *Giffard* for Dr. *Briggs*.

Mr. *Lewin* in reply.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I have no doubt, upon the wording of this bequest, that personal ornaments would not pass. It does not depend on the meaning of the word "plate," nor is this case governed by the authority of *Spencer v. Spencer*, a note of which has been shewn to me by the Registrar, from which it appears, that it was held by the Master of the Rolls, that, under the particular circumstances, there being several bequests, a gold watch passed by the word "plate." Here, the words are "I give and bequeath my household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all and singular other my household furniture and effects which at the time of my decease shall be in or about my said mansion-house" to trustees, "in trust for the person or persons for the time being entitled to the actual possession of my said mansion-house under and by virtue of the limitations contained in this my will, so that the same may go and belong to my said mansion-house and be held and enjoyed therewith as and in the nature of heirlooms." I think it is clear, that, by that description, nothing that was merely a personal ornament would pass, but only those articles which, according to the language of the Court in *Cole v. Fitzgerald* (a), were adapted for the use and ornament of the house.

The only question then upon which any doubt could arise, would be concerning the pictures, which it appears are adorned in a costly manner, and are very valuable; and without de-

termining whether or not they would pass under the word "pictures," as to which, I think, there may be some doubt, I should wish to see them before I decide; because, if they were not articles ordinarily worn, but more resembling miniatures not intended to be worn, they might pass under this bequest. I propose, therefore, to make a declaration, that, by this bequest, none of the articles mentioned in the schedule passed, which were articles exclusively of personal ornament, and not adapted for the use or ornament of the house; and I will hereafter examine the articles concerning which there remains a doubt, and will decide whether they would pass by the gift or not.

1856.
TEMPEST
v.
TEMPEST.
—
Judgment.

As to the question of costs, I wish to have an opportunity of considering the case of *Robinson v. Geldard* (a), before I determine it.

I cannot give Dr. *Briggs* any special costs, as the Attorney-General is before the Court and would protect his interest in the matter.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I find there are several articles, and not only the pictures, about which there is a doubt. For instance, there is an old crystal necklace which probably was never worn. I must therefore direct an inquiry which of these several articles passed by the gift according to the declaration which I have made.

June 26th.

I have looked at the case of *Robinson v. Geldard* (a): as to the question out of what fund the costs are to be first paid, and I think that I am concluded by that case: Lord *Truro* there held a similar charitable bequest to be a demonstrative legacy, citing *Acton v. Acton* (b), in which the

(a) 3 Mac. & G. 735.

(b) 1 Mer. 178.

1856.
 TEMPRET
 v.
 TEMPRET.
 —
Judgment.

gift was of 4000*l.* out of money in the hands of the testator's bankers; and Sir *W. Grant*, Master of the Rolls, held, that the fund was to be kept intact for the payment of that legacy, there being a necessity for the abatement of the general legacies in order to pay the debts. Holding such a legacy to be demonstrative, the bequest being expressed to be in priority to other legacies, makes the case stronger; because, if any part of this particular fund be taken to pay the costs, that would increase the fund for payment of the other legacies, including the residuary bequest, at the expense of this fund of pure personalty.

June 27th. Mr. *Rolt*, Q. C., mentioned the case again, and pointed out to the Court, that, in *Robinson v. Geldard* (a) the costs were apportioned rateably between the two funds.

Mr. *Wickens*.—That was by the order of the Vice-Chancellor, and from that part of his decree there was no appeal, so that it could not be altered by the Lord Chancellor.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am bound to follow the principle of that decree: the two parts of it, as they stand, are inconsistent; but as that is occasioned by the appeal having been confined to one part only of the decree, I must follow that part which was the decree of the Lord Chancellor, and must therefore hold, that the costs must come out of the other personal estate, in preference to the pure personalty.

(a) 3 Mac. & G. 735.

1856.

WILLETER v. DOBIE.

June 23rd.

A SPECIAL CASE.

Ann Willeter, the deceased wife of the Plaintiff, by her will in 1852, in exercise of certain powers of appointment notwithstanding coverture, given to her in manner therein recited in relation to certain trust moneys and property therein specified, and settled upon her for her separate use, after appointing the interest and dividends of certain sums of stock to the Plaintiff for life, with remainders over, bequeathed and directed as follows:—"And I give and bequeath unto the said *David Black Dobie*" (meaning the Defendant *Dobie*) "the sum of 50*l.*, and I also give and bequeath to my niece *Maria Harris* the sum of 50*l.* under this my will; and from and after payment of my just debts, funeral and testamentary expenses, and the expenses attending the execution of this my will, I direct and appoint that the rest, residue, and remainder of all and every the said trust moneys, and all other my personal estate and effects shall be divided among my nieces," (naming them), "share and share alike;" and the testatrix appointed the Defendants *Dobie* and *Willeter* executors and trustees of her will.

The testatrix died in 1854, leaving the Plaintiff surviving.

The Defendants held in their hands 11*l.* 15*s.* 7*d.* of the assets of the testatrix applicable to the payment of the bequests mentioned in the foregoing extract from her will.

The Plaintiff had paid out of his own funds, the funeral expenses of the testatrix, amounting to 6*l.* 2*s.* 2*d.*

Husband and Wife—Wife's Funeral Expenses—Will by married Woman—Power.

A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, and "after payment of her just debts, funeral and testamentary expenses, and the expenses attending the execution of her will, appointed" the residue of the trust moneys among her nieces:—*Held*, that the charge of funeral expenses was not contingent upon her surviving her husband, and that her husband surviving was entitled to repayment, out of the trust moneys, of money paid by him in respect of such expenses.

1856.
WILLETT
v.
DOBIE.
Statement.

The questions for the opinion of the Court were—

1. Whether the testatrix had, by the terms of the clause above set out, charged the payment of her funeral expenses on the residue of her separate estate, and whether the Plaintiff was entitled to repayment of the 64*l.* 2*s.* 2*d.* out of such residue.

2. Whether, if the Plaintiff should be so entitled, the two legacies of 50*l.* each given to the said *David Black Dobie* and to the said *Maria Harris* were payable, in the first place, out of the assets forming the residue of the estate of the testatrix, or abated proportionably with the amount of the funeral expenses, in the event of a deficiency of such assets.

Argument.

Mr. *Gowan*, for the Plaintiff, contended, that the testatrix had charged the payment of her funeral expenses on the residue of her separate estate, and that the Plaintiff was entitled to repayment of the 64*l.* 2*s.* 2*d.* out of such residue.

In reference to the second question, he conceded that the two legacies of 50*l.* were payable, in the first place, out of the assets forming the residue, and did not abate proportionably with the amount of the funeral expenses, in the event of a deficiency of assets.

Mr. *Moxon* for the Defendants:—

The charge of the funeral expenses was intended by the testatrix to be contingent upon the event of her surviving her husband; but she died in his lifetime; and there is nothing to prevent the application of the ordinary rule, that a husband is liable to pay the funeral expenses equally with the debts of his deceased wife.

[The VICE-CHANCELLOR.—That rule is not disputed; but the point is, whether, by this clause in her will, the wife has not relieved her husband out of her separate estate—whether she has not made him a present, in effect, of what her funeral expenses would have cost him.]

1856.
WILLETER
v.
DOBIE.
—
Argument.

The construction which would make the appointment of the residue subject to the funeral expenses of the testatrix, would extend to make it subject also to her just debts; and the husband might, with equal justice, claim to be reimbursed all moneys expended by him in payment of such debts, as well as what he has expended in payment of her funeral expenses.

[*Gregory v. Lockyer* (a) and *Jenkins v. Tucker* (b) were cited as the only authorities bearing on the point.]

A reply was not heard.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think this is a good charge of the wife's funeral expenses upon the residue of her separate estate in any event, and not contingent upon the event of her surviving her husband. In making the charge, she must be taken to have had in mind her power to deal with her separate estate as a feme sole, and to have intended to exercise that power to the extent of the charge. The appointment to her nieces, which is connected with and immediately follows the charge in question, is expressly made "after payment of" her just debts, funeral and testamentary expenses, &c. She has given nothing to her nieces until such debts and expenses are paid. Had the property in question consisted of real estate, I

Judgment.

(a) 6 Madd. 90.

(b) 1 H. Bl. 90.

1856.
 WILLETER
 v.
 DOBIE.
 Judgment.

should have held the words used by the testatrix sufficient to create a charge upon it of her debts, and funeral and testamentary expenses.

The result is, that the first question must be answered in the affirmative. The answer to the second question will be, that the legacies of 50*l.* are payable, in the first place, out of the assets forming the residuary estate of the testatrix.



June 20th.

OTTER v. LORD VAUX.

Mortgage—
 Power of Sale
 Purchase by
 Mortgagor—
 Subsequent In-
 cumbrancers.

A mortgagor, having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee under a power of sale contained in his mortgage, and subsequently granted further incumbrances to other persons, who had notice of the second mortgage. The purchase-money

By indentures of lease and release, dated the 13th and 14th days of October, 1837, a certain estate called *Bedwas*, which was vested in *Jane Llewellyn*, widow, for life, with remainder in fee to her son *William Llewellyn*, together with other estates, all late the property of *Llewellyn Llewellyn*, the late husband of *Jane*, and father of *William Llewellyn*, were conveyed to *Henry Goude* by way of mortgage, to secure 4000*l.* and interest. And the said *Jane Llewellyn* and *William Llewellyn* covenanted with the said *Henry Goude* to pay the mortgage money and interest, and for title in the usual way, and the mortgage deed also contained a power of sale to be exercised by the said *Henry Goude* in default of payment.

By indentures of lease and release, dated the 12th and 13th days of January, 1838, after reciting the making of the aforesaid mortgage, *Jane* and *William Llewellyn* concurred in conveying the same estates, including *Bedwas*, to one

not being sufficient to pay off the first and second mortgages:—*Held*, that the second mortgagee was entitled to a charge upon the estate for the deficiency, and that he might obtain a decree of foreclosure against the mortgagor and the subsequent mortgagees.

Quære, whether this would be the case if the estate had been sold under the power to a stranger, and subsequently purchased from such stranger by the mortgagor.

Geach, in fee, "subject to the said mortgage for 4000*l.* to the said *Henry Goude*," by way of mortgage, to secure 1520*l.* and interest; and they covenanted to pay this sum and interest, and also for title, including a covenant for further assurance of the said hereditaments ("subject as aforesaid") to the said *Geach*, in fee, by "the said *Jane Llewellyn* and *William Llewellyn*, and their heirs, and all other persons whosoever having, or lawfully or equitably claiming, or who shall or may have or lawfully or equitably claim any estate, right, title, or interest in or to the said hereditaments."

1856.
 OTTER
 v.
 LORD VAUX.
 —
Statement.

A memorandum of this second mortgage was indorsed upon the first mortgage deed.

In the year 1838, the second mortgage was transferred to the Plaintiff *Otter*.

Subsequently the estates were mortgaged again to one *Williams*, subject to the two preceding mortgages.

In the year 1840, *Goude* advertised the estates for sale, in exercise of his power of sale as first mortgagee; and *William Llewellyn* contracted with him for the purchase of the *Bedwas* estate for the sum of 1150*l.*, which he paid to *Goude*, and took from him a conveyance of this estate, in which *Jane Llewellyn* concurred.

Goude sold the rest of the property comprised in his mortgage to other persons, but the whole of the purchase-money received by him for all the property, including the *Bedwas* estate, was not more than the amount of his mortgage debt.

In 1844, *William Llewellyn* made an equitable mortgage by deposit of the title-deeds of the property with one *Mos-tyn*, to secure 140*l.* and interest. This mortgage was now vested in the Defendant Lord *Vaux*.

In 1853, *William Llewellyn* mortgaged the same pro-

1856.
 OTTER
 v.
 LORD VAUX.

Statement.

perty to the Defendant *Mary Llewellyn*, by deed, to secure 1192*l*, 10*s*. and interest, subject to the last-mentioned equitable mortgage.

Mostyn and *Mary Llewellyn*, at the respective times of taking their mortgages, had notice of the mortgage to *Geach*, which was still unpaid.

Otter now filed this bill against Lord *Vaux*, *Mary Llewellyn*, and *William Llewellyn*, for foreclosure.

Argument.

Mr. *W. M. James*, Q. C., and Mr. *Giffard*, for the Plaintiff:—

This case is governed by *Toulmin v. Steere* (a), in which case, there being three incumbrances, and the third incumbrancer having obtained a transfer to himself of the first charge, the mortgagor subsequently sold the estate to the Defendant, with the concurrence of the third incumbrancer, whose two incumbrances were paid off out of the purchase-money; and as the purchaser had constructive notice of the second charge, the estate was held to be still liable to that charge in his hands, the transaction being treated as in effect a payment of the first and third charges by the mortgagor, and then a sale by him to a purchaser with notice of the second charge. So in *Parry v. Wright* (b), where a man purchased an estate subject to two mortgages, and paid off the first and took a conveyance of the estate without keeping alive the mortgage-debt, and subsequently mortgaged the estate to another person, who had notice of the previous mortgages, it was held, that, by this transaction, the second mortgage, which had not been paid off, was the first charge on the estate.

But if not, *William Llewellyn* was bound, under the covenant for further assurance in the mortgage to *Geach*, to

(a) 3 Mer. 210.

(b) 1 S. & S. 369; 5 Russ. 142.

convey the estate which he purchased of *Goude* as a further security for *Geach's* mortgage, particularly as the mortgage to *Geach* contained no mention of the power of sale in the previous mortgage to *Goude*. In *Smith v. Phillips* (a), a mortgagor had contracted to grant a lease of the mortgaged premises to A., and the mortgagee, upon his subsequently purchasing the equity of redemption with notice of this contract, was compelled to perform it. [VICE-CHANCELLOR.—I suppose the objection on the other side will be, that the equity of redemption was not purchased by *William Llewellyn*, but destroyed.] But even then, if the first mortgage was destroyed, the mortgagor having received the money of the second mortgagee, and given him a security upon that estate, with a covenant for further assurance, the mortgagor cannot set up against the second mortgagee the mode in which the mortgagor acquired the estate, but was bound to make further assurance; and the purchaser from him, having notice of this mortgage, was bound by that covenant.

Then, at the time of the purchase, *William Llewellyn* was in possession of the estate, and therefore was tenant at will to the mortgagees; and any advantage which he obtained by virtue of that estate would belong to his landlord: *Doe v. Pott* (b), *Saunders v. Lord Annesley* (c). [VICE-CHANCELLOR.—The bill only prays for foreclosure.] Specific performance of the covenant for further assurance can be decreed under the prayer for general relief.

[The VICE-CHANCELLOR.—A tenant may purchase any title consistent with his landlord's rights, but not any which is inconsistent therewith.]

Mr. Rolt, Q. C., and Mr. R. W. Hawkins, for Lord Vaux:

This case is not governed by *Toulmin v. Steere* (d). The

(a) 1 Keen, 694.

(b) 2 Dougl. 709.

(c) 2 Sch. & Lef. 73.

(d) 3 Mer. 310.

1856.
 OTTER
 v.
 LORD VAUX.
 Argument.

1856.
 OTTER
 v.
 LORD VAUX.
 —
Argument.

second mortgagee, having notice of the first mortgage, had constructive notice of the power of sale, which is a power commonly enough inserted in mortgage deeds. Having such notice, he took subject to the possible exercise of that power; and if the estate had, on the sale, produced sufficient to pay both mortgages, there is no doubt that he could only have had a remedy against the surplus money after payment of the first mortgage: *Hill v. The Great Northern Railway Company* (a). He cannot have more than he contracted for. The new estate acquired by the mortgagor by his purchase under the power of sale was not such an estate as he was bound to convey under the covenant for further assurance. Such a covenant only relates to outstanding estates existing at the time it was made; and to give the second mortgagee a charge upon the estate acquired by the mortgagor under the power of sale, would be to give him not a further assurance, but a further security.

Mr. *Amphlett* and Mr. *C. Roupell* for *William Llewellyn*:—

If the argument of the Plaintiff is to succeed, then there would remain a charge by implication upon the estate in every case where a mortgaged estate has been sold under a power of sale, and purchased by the mortgagor, to the extent to which subsequent incumbrances were not satisfied by the purchase-money. How far is such a doctrine to extend? Will it hold where the purchase was not by the mortgagor himself, but by some other person, and after several mesne assignments the estate was bought by the mortgagor?

Mr. *W. M. James*, Q. C., in reply.

(a) 5 De G., M'N. & G. 66.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I am inclined to think, that, even upon the narrower ground suggested in the argument, there would be a good deal to say in favour of the Plaintiff in this case. The mortgage under which the Plaintiff claims was stated, in the mortgage deed, to be subject to a previous mortgage created by the indentures therein mentioned, without noticing the power of sale, and the Plaintiff's mortgage then contained covenants, that, except as aforesaid, there was no charge upon the estate; and that the mortgagor had a good right to convey, and that he would execute all requisite deeds further to assure the estate subject as aforesaid, but there was no allusion in that deed to the power of sale. I think these facts afford a strong ground for arguing, that it would not be according to the contract between the parties, to say that the second mortgagee took by the terms of the contract, subject to the power of sale in the first mortgage.

But I do not rest my decision upon that narrow ground. The broader view of the matter is, that, after the mortgage to the first mortgagee had been executed, conferring upon him a power of sale, as one mode in which the security might be enforced by him, and the mortgagor subsequently conveyed to the second mortgagee, subject to incumbrances, it shall be assumed that the second mortgagee had notice of the power of sale, as being one of the ordinary modes of enforcing a charge now generally introduced by conveyancers into mortgage deeds.

Then, what would be the position of the mortgagor if he had simply cleared off the first mortgage by payment of the money due upon it? In such a case, it is settled by authority, as was acknowledged by all parties in the argument, that the mortgagor could not set up the anterior charge so paid off against the second mortgagee, and that the effect of

1856.
 OTTER
 v.
 LORD VAUX.
 Judgment.

1856.
OTTER
v.
LORD VAUX.
Judgment.

paying off the first mortgage would be that the second mortgage would thereby become the first charge upon the estate. The same observation which was made in argument as to the inability of the second mortgagee to call upon the mortgagor to clear off the first mortgage, applies to the case I have suggested. The second mortgagee would not have any such right, he could not file a bill, either under the covenant for further assurance or otherwise, to compel the mortgagor to pay off the first mortgage. He can only say,—when once the mortgagor has done this which it was his duty to do, although the second mortgagee could not have compelled him to do it,—that it is impossible for the mortgagor to insist as against the person to whom he has given a second mortgage on his property, that there remains any prior charge on the estate, or that the mortgagor has any right to have the mortgage which he has paid off transferred, so as to keep it alive for his own benefit to the extent of the money which he supplied to pay it off. The answer to such a claim on the part of the mortgagor would be, “ You have only discharged your own debt, and you are only doing justice as between yourself and your second mortgagee, by giving the fullest effect to his security that can possibly be given, and you have therefore no claim to set up that prior charge against him.”

Then, there being this first mortgage, and there being just the same duty, as between the mortgagor and the first mortgagee, for the mortgagor to pay off his mortgage, and the power of sale being only given as a means of enforcing that payment if it should not be made otherwise, the mortgagor has paid the money to the first mortgagee in this way—instead of paying off the mortgage and clearing the estate of that incumbrance, which would be for the benefit of the second mortgagee, the mortgagor pays the money to the first mortgagee, and takes a conveyance of the estate from the first mortgagee by the exercise of the power of sale.

How can he set up a right to the estate so obtained against his own mortgagee, to whom he has by his own act given a charge upon it, any more than, if he had paid off the first mortgage, he could have the debt so paid off transferred for his own benefit as between himself and the second mortgagee? This equity does not depend upon the doctrine of the debt being merged or extinguished. If the mortgagor, on paying off the first mortgage, had taken an assignment to a trustee for himself, he could not set up that mortgage debt outstanding in the trustee against the second incumbrancer; therefore the equity does not depend on the debt being gone by the effect of the payment: if the debt were kept alive in the way I have mentioned, the effect would still be, that the mortgagor would be estopped in consequence of his mortgage from setting up that debt against the second mortgagee.

The whole argument has been, that the second mortgagee simply contracted to have the benefit of his mortgage, subject to the prior charge and to the power of sale, by which the first mortgagee might at once defeat all succeeding limitations of the estate, and those limitations being gone, the second mortgage, being a charge only on the subsequent interest in the property, is also gone, and the only remedy is against the purchase-money received for the estate after satisfaction thereof of the prior mortgage; and that, if the Court were to hold otherwise, the second mortgagee would have the security of this purchase-money and also of the estate: so that, if, instead of the purchase-money being insufficient to pay off the first mortgage, there had been a surplus of 1000*l.*, the second mortgagee would take that, and also a charge upon the estate freed from the anterior mortgage. But I think that a complete answer was given to this argument in reply, viz. that the real question is, whether the contract is not fully performed between the mortgagor and the second mortgagee, who, if he gets the full benefit of that payment,

1856.
 OTTER
 v.
 LORD VAUX.
 Judgment.

1856.
 OTTER
 v.
 LORD VAUX.
 —
Judgment.

gets no more than he is entitled to. The first mortgagee must account to the second for the extra 1000*l.*, and the consequence would be, supposing the mortgage debt of the second to be 2500*l.*, that there would only be 1500*l.* of that left a charge upon the estate. The contract is not altered, it was to secure to the second mortgagee 2500*l.* The mortgagor pays this money to the first mortgagee, and takes from him a conveyance of the estate. The amount so paid, I have supposed to exceed the amount of the first mortgage by 1000*l.*; that will go towards paying off the second mortgage, and will leave the second mortgage with a charge upon the estate diminished by that payment.

That appears to me to be the sound view to take of the result of these facts. I do not now enter into the difficulties that might arise in a case where the first mortgagee sold the estate under a power of sale, and the property, after passing through six or seven different hands, may at last be purchased again by the mortgagor; because there would not, in that case, be the circumstance that there is here, namely, the payment by the mortgagor into the hands of the first mortgagee of the money which, by all the terms of his contract, the mortgagor was bound to pay to the first mortgagee in discharge of the mortgage debt. Here, the estate is cleared of the first incumbrance by the mortgagor, by the exercise of the power of sale in his favour, instead of a simple payment off by him of this mortgage.

It may be said that the second mortgagee has a greater benefit than he contracted for, because the charge of the first mortgagee is cleared off by his having exercised his power of sale, and the second mortgagee will have the full benefit of that, although the first mortgagee have been thereby fully paid. But that would be no argument against the rights existing between the second mortgagee and the mortgagor, which are, that the mortgagor having con-

tracted with the second mortgagee to give him a security upon that particular estate for a certain sum of money, if the prior charge be cleared off in any mode by the act of the mortgagor, it is impossible for him to say, I will hold the estate free from the incumbrances, without fulfilling my contract of giving to the second mortgagee a security upon the estate to the amount of the money which he so advanced. It would be too thin a distinction to say, that where no power of sale exists there would be no possibility of doing this, but that, by means of the power of sale in the first mortgage, the first mortgagee is enabled to sell the estate to the mortgagor, and the mortgagor is enabled to make, by such purchase, a title to the estate as against his own incumbrancer, who remains unsatisfied. Such a state of things would be inconsistent with the contract.

1856.
 OTTER
 v.
 LORD VAUX.
 Judgment.

My decision, in this case, rests upon the broad ground that the estate is still liable to the second mortgage in the hands of the mortgagor and those who claim under him with notice of that mortgage. Otherwise, the mortgagor, having in his pocket money enough to pay off the first mortgage, might say, in such a case, I will not pay off the mortgage, but buy the estate free from all claims. In other words, he applies the fund to relieve the estate in his own favour, and not in favour of those to whom he has pledged it, availing himself of the machinery of the power of sale.

There must be a decree for an account and payment of what is due for principal and interest on the second mortgage.

1856.

Jan. 11th &
June 30th.THE AFRICAN STEAM SHIP COMPANY
v. SWANZY AND KENNEDY.

*Merchant Ship-
ping Act, 1854,
Part ix—17 &
18 Vict. c. 104,
s. 504—Con-
struction—
"Value of
Ship"—S. 514,
Costs under.*

The value of a ship, within the meaning of the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), s. 504, is not the value which the owner would have set upon his ship; nor is the sum for which the owner may have recently insured his ship, the only criterion, although it is one of many criteria, of its value: but, under ordinary circumstances, and with the exception of a case where there is no market for a ship of the kind, such value will be taken to be what the ship would have fetched if sold immediately before her loss.

In the excepted case the Court would ascertain the price given for the ship, and the subsequent deterioration,—*semble*.

Shipowners, being under a contract to replace their ship immediately if lost, insured her for 10,000*l.*; two months after which the ship was lost:—*Held*, that they were not estopped from proving, in a suit instituted by them under the 514th section of the Act, that the value of the ship, at the time when she was lost, did not exceed 5900*l.*

In a suit instituted by a shipowner under the 514th section of the Merchant Shipping Act, 1854, to determine the amount of his liability in respect of the losses there mentioned, to have such amount distributed rateably amongst the several claimants, and to stop actions at law in relation to the same subject-matter, there being no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of costs, and over which the Plaintiff has no control, the Plaintiff, as the party eased by the proceedings, pays all the costs of all claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit.

THE Plaintiffs were the owners of a ship called *The Fore-runner*, which, in October, 1854, was lost with all her cargo, and the luggage of all the passengers on board. In 1855, separate actions were commenced against the Plaintiffs by the Defendant *Swanzy*, the owner of a part of the cargo, and the Defendant *Kennedy*, one of the passengers, to recover the value of their property lost with the vessel.

The Plaintiffs then filed their bill under the 514th section of the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104), praying, that the value of the ship and freight might be ascertained under the direction of the Court, and apportioned by the Court between the persons who should establish their claims, and to restrain the Defendants from prosecuting their actions against the Plaintiffs in respect of the loss of the ship.

Upon motion for an injunction, an order was made in terms of which a minute has already appeared in this series of Reports (a). By that order the injunction was granted, and an inquiry was directed as to the value of the ship.

1856.
THE AFRICAN
STEAMSHIP CO.
v.
SWANZY.
Statement.

In the course of the inquiry as to the value of the ship, it appeared, that, in December, 1852, the ship was purchased by the Plaintiffs for 12,897*l.*—paid in shares in the company; that, shortly after she was purchased by the Plaintiffs, and from that time until she was lost, the ship had been employed by the Plaintiffs, under a contract with Government, to carry the mails to *Fernando Po*; that while so employed, she had made voyages amounting in the whole to about 100,000 miles; and that, about two months before her loss, she was insured by the Plaintiffs for 10,000*l.*, which amount had been paid by the underwriters. At the time when the insurance was effected, the Plaintiffs were bound by their contract with the Government to replace the ship immediately in the event of her being lost.

Estimates of valuers as to the price which the ship would have fetched at the time when she was lost, were in evidence. Mr. *Bailey*, a valuer selected by the Defendants as well as by the Plaintiffs, estimated that price at 5900*l.*, other valuers estimated it, some at 6000*l.*, others as low as 4000*l.*

The question, what was the value of the ship within the meaning of the term "value" in the 504th section of the Act, now came on to be argued upon an adjourned summons.

Jan. 11th.

Mr. *James*, Q. C., and Mr. *Cole*, for the Defendant *Swanzy*:—

Argument.

The true criterion of the value of the ship is, what, at the

1856.
 THE AFRICAN
 STEAMSHIP CO.
 v.
 SWANEY.
Argument.

time when the ship was lost, was her peculiar value to the Plaintiffs, having regard to the business in which she was employed, the growing nature of that business, and the adaptation of the ship for that business—what was the value to the Plaintiffs of their capital as represented by the ship when thus employed:—as in the case of fixtures in a house which are valued as they stand, and having regard to their adaptation to that particular house, and not at the price they would fetch if removed. The market value of the ship—the mere price which any stranger would have given for her—cannot be the criterion intended by the Act. Suppose one company to buy up all vessels of this description, and to obtain a monopoly of the only business for which they are adapted, such vessels would no longer have any market value.

At all events, the ship having been insured for 10,000*l.* only two months before her loss, and 10,000*l.* having been received by the Plaintiffs from the underwriters, the Plaintiffs are estopped from estimating her value at less than that sum. They are not to make a profit by insurance.

Mr. *Cairns*, in the absence of Mr. *Rolt*, Q. C., for the Plaintiffs:—

The peculiar, accidental, value of the ship to the Plaintiffs cannot be the proper criterion of her value under the 504th section of the Act; otherwise, the owner might be exposed to actual loss—Suppose a yacht which has won two years successively, and of which the owner will be entitled to a large prize if she wins the third year: if she is lost before the third race, the owner is not to be fixed with the accidental value which, at the time of her loss, he attached to her.

Nor can the price the vessel fetched two years before she was lost, be a test of her value, it being well known that

ships deteriorate yearly 25*l.* per cent. Besides, even that price was not paid for in money, but in shares in the company, and non constat at what price such shares then stood.

1856.
THE AFRICAN
STEAMSHIP Co.
v.
SWANBY.
Argument.

Nor, thirdly, is the amount of insurance the criterion of value. The question on which the amount of insurance is determined by the party who insures is, what will it cost to replace the thing insured? Here, the Plaintiffs were under a contract to replace the ship immediately, at whatever cost. The amount of insurance is never intended as an accurate representation of value in the ordinary sense of the word.

These tests being all fallacious, we propose to leave it to the Court to say upon the evidence, such evidence being conflicting, what would the ship have fetched at the time when she was lost?

[He then argued, that the evidence shewed the true value was 4000*l.*, or, at the utmost, and upon the estimate of the Defendants' own witness, not more than 5900*l.*]

Mr. *James*, Q. C., in reply:—

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This case is one of some importance, being, if I am rightly informed, the first which has arisen under the 504th section of the Act.

Judgment.

The only question of which I have to dispose is, what is to be taken to be the value of this ship within the meaning of the term "value" in the 504th section of the Act.

The natural and obvious meaning of the term in question,

1856.
THE AFRICAN
STEAMSHIP CO.
v.
SWANEY.
Judgment.

and that which under ordinary circumstances the Court would attribute to it, is what the ship would have fetched had she been sold immediately before her loss.

It was contended, that this would lead to too low an estimate, and that the Court ought to inquire what, at the time when the ship was lost, was her peculiar value to the Plaintiffs, having regard to the business in which she was employed, and the growing nature of that business. But to adopt the peculiar value which the owner would have set upon his ship as the criterion of her value within the meaning of the Act, would be to open too large a field of inquiry.

It is true, that the sum which the ship would have sold for, cannot, in all cases, be a true criterion of its value. Cases might arise, in which to adopt that criterion would lead to undue depreciation. A particular class of ships might be adapted for one particular description of traffic, and for that alone; and that description of traffic might be entirely occupied by one company, with which it might be hopeless to compete, so that there would be no market for a ship of that particular description. If such a case should ever occur, it would be necessary for the Court to adopt some other criterion. One I venture to suggest might be, to ascertain the price given for the ship, and the subsequent deterioration. Some such criterion would have to be adopted; for otherwise the value of the ship would be what the ship would sell for to be broken up. Here, however, no one suggests that the value of this ship is to be taken at what she would have fetched to be broken up.

It was argued for the Defendants, that, where a ship has been insured, the amount of the insurance is the true criterion of her value, or rather, that the owner is estopped in such a case from shewing that her value, when insured, was

.

less than the amount of such insurance. But the practice of insuring vessels was extremely common when this Act was passed; and if the amount of insurance had been intended by the Legislature as the criterion of the value of a ship, it would have been easy for them to express it, and I must assume that they would have so expressed it. At any rate I cannot import such words into the Act. The amount for which a ship has been insured appears to me to be one of many criteria, but I cannot consider it as the sole criterion of the value of the ship.

In the particular case before me, I think that such a criterion would lead to too high an estimate of the value of the ship. The ship was bought by the Plaintiffs in December, 1852, for 12,897*l.*; and since that time she has sailed about 100,000 miles. Taking these facts into account, considering the sum for which she was bought, and allowing for subsequent deterioration, I am bound to conclude that 10,000*l.* would exceed the value of the ship at the time of her loss.

It was said, 'Why, then, did the plaintiffs insure for so large a sum as 10,000*l.*?' But to that, I think, the answer was satisfactory, that, being under a contract which bound them to replace the ship immediately in case of her loss, the Plaintiffs were compelled to insure for such a sum as it would cost them to replace their ship. In so doing, there was no fraud on their part. They only did what is constantly done by parties insuring houses, furniture, and other property in course of deterioration; all which, from year to year, and after the lapse of many years, are habitually insured at the same price as that for which they were insured when new, without any allowance for deterioration. This disposes of the argument that the Plaintiffs are estopped by the amount of the insurance from adducing evidence to shew that the price which the ship would have fetched at the

1856.

THE AFRICAN
STEAMSHIP CO.

v.

SWANEY.

Judgment.

1856.
 THE AFRICAN
 STEAMSHIP CO.
 v.
 SWANEY.
Judgment.

time when she was lost, was less than the sum for which they had insured.

[His Honor then examined the evidence of the valuers, and concluded thus:—]

Taking all the circumstances, therefore, into consideration, it comes to this, that Mr. *Bailey* estimates what the ship would have fetched at 5900*l.*, other valuers estimating it, some at 6000*l.*, others as low as 4500*l.*, or even 4000*l.*; and considering that this Act was passed in relief of the liability of shipowners, I adopt the estimate of Mr. *Bailey*, who was selected by both parties, as the true value of the ship with- in the meaning of the Act.

June 30th. The Defendants *Swanzy* and *Kennedy*, and several claim- ants who came in under the order, having established their respective claims, the cause now came on to be disposed of upon the question of costs.

Argument. Mr. *Rolt*, Q. C., and Mr. *Cairns*, Q. C., appeared for the Plaintiffs.

Mr. *James*, Q. C., and Mr. *Cole*, for the Defendant *Swanzy*; and

Mr. *Giffard* for the Defendant *Kennedy*, claimed the De- fendants' costs of the suit, and their costs at law of the ac- tions stayed by the injunction. By the 514th section of the Act (a), the Court had a discretion as to costs; and in the exercise of that discretion, it would follow the ordinary rule adopted in such cases, and order all costs to be paid by the party who was eased by the proceedings which the Act

(a) 17 & 18 Vict. c. 104.

had authorised. Here, the Plaintiffs were the parties eased by the proceedings, and there had been no adverse litigation over which the Plaintiffs had no control. The Plaintiffs, therefore, should pay the costs.

1856.
THE AFRICAN
STEAMSHIP CO.
v.
SWANZY.
Argument.

Mr. Rolt, Q. C., in reply, denied that the shipowner was the only party eased by the Act. Besides, what relief the shipowner obtained under the Act, was his by the true rule of right, and in conformity with the laws of all other nations, and was not to be looked upon as a favour conferred by the Act. In such a case, the decision ought not to depend on the question, who is eased by the proceedings which have been instituted.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think the decision ought to depend upon the question, who is eased by the proceedings which the Act has authorised to be instituted. And here it is clear, that the Plaintiffs, as owners of the ship, are the parties who have been eased by such proceedings.

Judgment.

By the 514th section of the Merchant Shipping Act, 1854, in cases where liability has been incurred by any owner in respect of loss of life, personal injury, or loss of or damage to ships, boats, or goods, and several claims are made or apprehended in respect of such liability, this Court is empowered, subject as there mentioned, to entertain proceedings at the suit of any owner for the purpose of determining the amount of such liability, and for the distribution of such amount rateably amongst the several claimants, with power to stop all actions and suits pending in any other Court in relation to the same subject-matter. By adopting the proceedings which the Act has thus authorised, the shipowner is enabled to protect himself from as many

1856.
THE AFRICAN
STEAMSHIP Co.
v.
SWANEY.
Judgment.

separate actions as there are claimants for compensation. If he thinks it for his benefit to stop all these actions, the Act enables him to do so in a suit instituted by him for the purpose. The owner only can institute the suit in which the Court can give relief under the 514th section. If he chooses to institute it, he, as the party eased, is *prima facie* the party who should bear the costs.

If it were a case in which there had been adverse litigation between the claimants amongst themselves, or any other special circumstance occasioning an increase of costs, and over which the Plaintiffs had no control, a question might be raised. But here there has been no such litigation—Here, there has been nothing special, occasioning costs over which the Plaintiffs had no control. The Defendants, as well as the other claimants, have established their claims in this Court; I must assume, therefore, that the Defendants would have established such claims in the actions they commenced at law; and, establishing their claims at law, they would have been entitled there to their costs. I must, therefore, order that all the costs be borne by the Plaintiffs.

By all the costs, I mean that the Plaintiffs must pay the Defendants their costs not only of this suit, but also of the actions at law, which the Defendants would have obtained if the Plaintiffs had not restrained them, in order to have the amount of their own liability ascertained and distributed here; and the Plaintiffs must also pay the costs of all the other claimants who have come in under the order, and established their claims in this Court.

Ordered accordingly.

1856.

WEBB v. BYNG.

June 9th.

ANNE CRANMER, by her will in 1844, amongst other devises and bequests, gave as follows:—"I give to my great nephew *Henry Webb Byng* the livings of *Quendon* and *Chickney*, should he like the profession and be qualified for them, or to *William Cranmer Byng*. . . . I give in trust to my executors, for my niece *Mary Anne Byng* and her children, all my *Quendon-Hall* estates in *Essex*, provided she takes the name of *Cranmer* and arms, and her children, with my mansion-house, furniture, plate, books, linen, &c., *Archbishop Cranmer's* portrait by *Holbein*, the *Indian* cabinet in drawing-room, and striking watch, and my diamond earrings and pins, as heirlooms with my estate."

Will—Construction—Children.

Devise of real estate to one and her children,—*Held*, although there were children in esse at the date of the will, to create an estate tail; that being the only mode of effecting the whole intention of the will.

The testatrix devised the residue of her real and personal estate and effects to *Mary Anne Byng*, and appointed the Plaintiffs her executors.

"*Living*"—*Adovowson.*

The word "*living*" is sufficient to pass the adovowson, but it may be restricted to the next presentation. The context must determine which is its meaning.

The testatrix died in 1853.

Mary Anne Byng died in the lifetime of the testatrix, leaving *Alfred Molyneux Byng*, her eldest son, *Henry Webb Byng*, and six other children, who all survived the testatrix. *William Cranmer Byng*, another son of *Mary Anne Byng*, died in the lifetime of the testatrix.

Devise to a minor of "*the livings of Q. and C.*" should he like the profession and be qualified for them:—*Held*, to shew an intention to confer on the devisee a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the adovowson.

Henry Webb Byng was an infant, aged about sixteen years.

The cause now came on for further consideration.

fit; therefore, that the devise was confined to a single presentation, and did not extend to the adovowson.

1856.
 WEBB
 v.
 BYNG.
 —
 Argument.

Mr. *Karslake* appeared for the Plaintiff

Mr. *Cairns*, Q.C., and Mr. *Thring*, for the Defendant *Alfred Molyneux Byng*, contended, that, upon the true construction of the will, the *Quendon-Hall* estates were devised to *Mary Anne Byng* as tenant in tail; and that, *Mary Anne Byng* having died in the lifetime of the testatrix, the Defendant *Alfred Molyneux Byng*, as her eldest son, was now entitled as tenant in tail of such estates.

They relied on the name and arms clause, and the gift of the heirlooms, as well as upon the gift of the estate as one entire estate, as being inconsistent with the supposition that the testatrix intended the children of *Mary Anne Byng* to take either concurrently with her, or as joint tenants after her decease — inconsistent, in short, with any supposition except that the testatrix intended a simple descent from parent to child.

They cited *Wood v. Baron* (a) and *Doe v. Bradley* (b), to shew that the rule, inaccurately called the rule in *Wilde's case* (c), that, under a gift to A. and his children, if he have children at the time, they must take concurrently, is not an absolute and unyielding rule of law, but is liable to give way in order to carry out the general intention of a testator, as inferred from the whole of his will; and that, although "children" may be a word of purchase, yet it may also be a word of limitation; and if, as here, the intention is inconsistent with any other interpretation, it must be held a word of limitation.

They contended also, that, under the gift of the livings of *Quendon* and *Chickney*, having regard to the words which followed, "should he like the profession and be qualified

(a) 1 East, 269.

(b) 16 East, 399.

(c) 6 Rep. 16 b.

for them," *Henry Webb Byng* could not take more than the next presentation, even assuming him to comply with those conditions; and that the advowson passed as part of the lapsed residuary real estate to the heir-at-law.

1856.
 WEBB
 v.
 BYNG.
 Argument.

Mr. *Rolt*, Q. C., and Mr. *G. L. Russell*, for the children of *Mary Anne Byng*, other than *Alfred Molyneux Byng* her eldest son :—

The devise of the *Quendon-Hall* estates was a devise to *Mary Anne Byng* for life, with remainder to her children as joint tenants in fee.—“Children” is *primâ facie* a word of purchase; and here, so far from containing anything to rebut that presumption, the will contains provisions amounting to evidence in its favour. The words “I give in trust” indicate that the testatrix contemplated successive interests, and the direction as to heirlooms is not inconsistent with successive interests, such as we contend for. The condition as to the name and arms of *Cranmer* is to be complied with by all the children; the Court, therefore, would expect a gift commensurate with the condition, and that all are to derive a benefit under it.

In *Wilde's case*, there was no child in esse at the date of the will; and the only way in which the Court could avoid disinheriting the children, was by construing the word “children” as a term of limitation, and giving an estate tail to the parent. Here, children were in esse at the time, and the testatrix took notice of the fact, providing for some of them *nominatim*.

[They cited on this point *Mason v. Clarke* (a), a dictum of Lord *St. Leonards'* in *Heron v. Stokes* (b), not overruled by the partial reversal of that decision in *D. P.* (c), *Crawford*

(a) 17 Jur. 479. (b) 2 Dr. & W. 107. (c) 9 Jur. 563.

1856.
 WEBB
 v.
 BYNG.
 Argument.

v. Trotter (a), Vaughan v. The Marquis of Headford (b),
 Buffar v. Bradford (c).]

Then, as to the livings, the word "living" is used, not only in common parlance but in Acts of Parliament, as equivalent to "advowson;" and the words which follow the devise of the livings may be satisfied by construing them as simply expressive of the motive of the gifts: the case being analogous to that of gifts of money professedly for the purpose of apprenticing a person to a particular trade, where, if he dislikes the trade, he may claim the money for advancement generally. Consequently, *Henry Webb Byng* is entitled to the advowsons.

A reply was not heard.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

However bold the decision may appear, I must hold this devise of the *Quendon-Hall* estates to have created an estate tail.

The rule, as stated by Lord *Hardwicke* in *Buffar v. Bradford* (c), is this: that the word "children," in its natural import, is a word of purchase and not of limitation; but that, where a contrary interpretation is necessary, in order to comply with the intention of the testator, there the word "children" will be held to be a word of limitation and not of purchase. The Court must look to the whole intention; and the question, therefore, in the present case is, whether, having regard to the whole intention of the testatrix, I can carry that intention into effect, without holding this to be an estate tail.

(a) 4 Madd. 361.

(b) 10 Sim. 639.

(c) 2 Atk. 220.

The testatrix's intention is expressed in these words, " I give in trust to my executors for my niece *Mary Anne Byng*, and her children, all my *Quendon-Hall* estates in *Essex*, provided she takes the name of *Cranmer* and arms, and her children, with my mansion-house, furniture, plate, books, linen, &c., Archbishop *Cranmer's* portrait by *Holbein*, the *Indian* cabinet in drawing-room, and striking watch, and my diamond earrings and pins, as heirlooms with my estate."

1856.
WEBB
v.
BYNG.
Judgment.

According to the decisions since *Wilde's case*, the general rule is, that, where there is a devise to one and her children, if she have children at the time, the word "children" is construed as a word of purchase and not of limitation, and the children take as purchasers concurrently and as joint tenants with their parent. But that construction could not have been intended by the testatrix in the present case. To hold that, in this case, the mother and her children were intended to take concurrently and as joint tenants, would involve this manifest absurdity, viz. that they must all live together in the same house, and jointly enjoy the various articles which the testatrix has given as heirlooms with her estate. This, therefore, very properly was not contended.

The contention was, that the devise was to the mother for life, with remainder to her children as joint tenants in fee. The only authority for such a construction is the case of *Jeffery v. Honeywood* (a), and even that has been overruled by *Broadhurst v. Morris* (b). Independently, however, of that consideration, what I chiefly rely upon is this, that the *Quendon-Hall* estate—the subject of this devise—is the estate by means of which the testatrix intends by her will to perpetuate the name of *Cranmer*; and if I were to hold that devise to have been a devise to *Mary Anne Byng* for life,

(a) 4 Madd. 398.

(b) 2 B. & Ad. 1.

1856.
 WEBB
 v.
 BYNG.
 —
Judgment.

with remainder to her children as joint tenants in fee, the estate would be divisible into eight separate estates, and, as the parties who take the property are also to take the name and arms, the result would be to found as many small families all bearing the name and arms of *Cranmer*, whereas the testatrix speaks of her estate as one and indivisible, and to be enjoyed in its entirety.

In rejecting such a construction in favour of one which will treat the word "children" as a word of limitation and not of purchase, I do not depart from the spirit of the rule in *Wilde's case*—the real rule in that case being, that it is lawful, as Lord *Hardwicke* puts it, to construe the word "children" as a word of limitation where the will necessitates such a construction. This is a case of that description, and, as the only means of keeping the property, which the testatrix has described as her *Quendon-Hall* estates, in one mass,—which is clearly the general intention of the will,—I am compelled to hold, that, in this will, the word "children" is a word of limitation, and that the devise created an estate tail.

Then, as to the livings, the devise is in these terms: "I give to my great nephew *Henry Webb Byng* the livings of *Quendon* and *Chickney*, should he like the profession and be qualified for them, or to *William Cranmer Byng*."

Now, the word "living" is ambiguous. It is sufficient to pass the advowson. On the other hand, it may be restricted to a single presentation: the law does not determine which is its meaning, and the point must be ascertained from the context. Referring in this will to the context, it is clear that, by the word "livings," the testatrix intended to pass not the advowson, but only a single presentation. The words "should he like the profession and be qualified for them," shew an intention to confer on the devisee a per-

sonal benefit; and that could only be effected by the devisee being himself presented to the livings. I must, therefore, hold that the devise of the livings is confined to a single presentation, and does not extend to the advowson.

1856.
 WEBB
 v.
 BYNG.
 Judgment.

There must be a declaration that the *Quendon-Hall* estates were devised to *Mary Anne Byng* as tenant in tail, and that the Defendant *Alfred Molyneux Byng* is now entitled thereto as tenant in tail. There must also be a declaration, that, upon the true construction of the will, the Defendant *Henry Webb Byng* is entitled to be presented to the livings, provided he shall comply with the conditions mentioned in the will.

The opinion of the Court was asked upon the question, whether the name and arms clause amounted to a condition precedent: his Honor thought it did not, there being no gift over; but said it was not necessary to decide the point, as the Defendant *Alfred Molyneux Byng* would take as heir-at-law of the testatrix, if not by the devise.

1856.

July 1st &
8th.

ECCLES v. CHEYNE.

Wills—7 Will.
4 & 1 Vict. c.
26, ss. 27, 33.
—*Power*—Ap-
pointment by
Will to a Child
—*Lapse*.

The enact-
ment in sect.
33 of the Wills
Act, 7 Will. 4
& 1 Vict. c. 26,
that a bequest
to a child of
the testator,
who dies in
the testator's
lifetime leav-
ing issue liv-
ing at the tes-
tator's death,
shall not lapse,
applies to a
testamentary
appointment
made in exer-
cise of a gene-
ral power.

Distinction,
in reference to
this subject,
between a ge-
neral and a
limited power.

Testatrix,
by her will in
1840, in exer-
cise of a gene-
ral power, ap-
pointed pro-
ceeds of real
estate to a
daughter who
died in her
lifetime, leav-
ing issue liv-
ing at the tes-
tatrix's death:
—*Held*, that
the personal
representative
of the daughter was entitled.

BY indentures of lease and release, dated July, 1831, real estate, of which *John Bibby* was then seised in fee, together with certain personal estate of *John Bibby*, was settled upon trust to sell and invest the moneys to arise from such sale; and it was declared, that, as to one equal undivided fourth part of the said moneys, and the securities thereon, the same should from time to time be invested upon trust to pay and apply the income and proceeds into the hands of *Mary Bibby*, the wife of *John Bibby*, or to such person or persons as she should from time to time, after the same should have become actually due, but not by way of anticipation, appoint to receive the same by any note or writing under her hand during her life; but such moneys should not be paid or payable to her until after the decease of *John Bibby*, and, until that event should happen, the moneys to be received as the income from the said one-fourth share should be retained by the trustees, and should remain in their possession to be disposed of as *Mary Bibby* should appoint by deed or will; and from and after the decease of *Mary Bibby*, then the portion thereby given for her benefit should be assigned and disposed of to and for such uses, trusts, intents, and purposes as *Mary Bibby* should, by her last will and testament, give, direct, limit, and appoint; and for want of such direction, limitation, or appointment, or when the same should be ineffectual, then such portion should be assigned or disposed of as the next of kin of *John Bibby* should order and direct.

Mary Bibby, by her will, dated 1840, after directing the payment by her executors of her funeral and testamentary

expenses, and the charges of the probate of her will, proceeded as follows:—"As to, for, and concerning all the rest, residue, and remainder of my estate and effects, both real and personal, of which I may die possessed, or of which I have the power to devise, bequeath, or appoint by will, I hereby give, devise and bequeath, limit, and appoint the same, and every part thereof, unto and equally between my daughters *Mary Eccles* and *Elizabeth Kidd*, their heirs, executors, and administrators, absolutely and for ever."

1856.
 ECCLES
 v.
 CHEYNE.
 Statement.

Mary Eccles died intestate in the lifetime of the testatrix, leaving issue, who survived the testatrix. Letters of administration to the personal estate and effects of *Mary Eccles* were granted to the Plaintiff.

Mary Bibby died in 1846, and *John Bibby* in 1849.

The hearing of the cause is reported in *Mr. Hare's Reports* (a).

The cause now came on to be heard on further directions.

Mr. *Rolt*, Q. C., and Mr. *J. T. Humphry*, for the Plaintiff:—

Argument.

The Plaintiff, as the administrator of *Mary Eccles*, is entitled to one equal moiety of the one-fourth part of the produce of the trust estates, by the settlement limited as *Mary Bibby* should appoint.

The 33rd section of the Act, 7 Will. 4 & 1 Vict. c. 26, provides, that, where any person being a child of the testator, to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person, shall die in the lifetime of the testator leaving issue, and any such issue of such

(a) Vol. 9, p. 215.

1856.
 }
 ECOLES
 v.
 CHEYNE.
 —
Argument.

person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator. And by the 27th section of the Act, a general devise or bequest is to be construed to include any real or personal estate which the testator may have power to appoint in any manner he may think proper.

Here, *Mary Eccles* was a child of the testatrix—she left issue living at the death of the testatrix—her interest under the appointment (or, in other words, under the bequest, since the 27th section includes in the term “bequest” an appointment under a general power,) was not determinable at or before her death. That bequest, therefore, by virtue of the 33rd section, did not lapse, but took effect as if her death had happened immediately after the death of the testatrix; and according to *Johnson v. Johnson* (a), the Plaintiff, as her administrator, was entitled to her share.

In *Griffiths v. Gale* (b), which will be cited contra, the power was in favour of particular objects, not, as here, a general power to appoint in any manner the testatrix might think proper.

Mr. *Daniel*, Q. C., and Mr. *Bagshawe*, jun., Mr. *Willcock*, Q. C., Mr. *Collins*, and Mr. *Hardy*, for parties claiming under the limitation over in default of appointment:—

The share appointed to *Mary Eccles* lapsed by reason of her death in the lifetime of the testatrix, and passed to the Defendants under the clause in default of appointment contained in the settlement of 1831. It has been expressly decided, that the 33rd section of the Act does not apply to a testamentary appointment, the word “lapse” equally with

(a) 3 Hare, 157. (b) 12 Sim. 327; *S. C.*, on a rehearing, *Id.* 354.

the words "bequeathed" and "bequest" being inapplicable to an appointment: *Griffiths v. Gale* (a). And it stands to reason that you cannot, under a power, appoint to a dead person.

1856.
ECCLLES
v.
CHRYNE.
Argument.

Mr. *Doria* for the trustees.

Mr. *Rolt*, Q. C., in reply.

[*Holmes v. Coghill* (b), and *Vaughan v. Vanderstegen* (c), were also cited.]

Other questions, principally of construction, were also discussed, but are not material to be reported.

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

July 8th.
Judgment.

The question in this case is, whether, a married woman having a general power to appoint by will, and having by her will exercised that power in favour of two of her children, one of such children having died in her lifetime leaving issue who survived the testatrix, the 33rd section of the Wills Act (d) applies, so as to prevent a lapse.

The question is one of considerable importance. It is also entirely new, for the case of *Griffiths v. Gale* (a) was decided on a distinct point. In *Griffiths v. Gale* the power was not a general, but a limited power,—a power to appoint to children, and to children only; and it could never have been the intention of the Act to extend a power, which in its creation was restricted to children, so as to include any persons but

(a) 12 Sim. 327; S. C., Id. 354. (c) 2 Drew. 165,
(b) 7 Ves. 499; S. C., 12 Ves. (d) 7 Will. 4 & 1 Vict. c. 26.
206.

1856.
 ECCLES
 v.
 CHEYNE.
 —
Judgment.

children. The power was not within the 27th section, which applies only to general powers—powers “to appoint in any manner the appointor may think proper”—words which clearly cannot extend to a power to appoint to children, and to children only. And, as the power was not within the 27th section,—as under that section the property, the subject of the appointment, would not have passed by a general bequest, the appointment could not be saved from lapse by the 33rd section, which applies only to property which passed by bequest.

But the question in this case is of a very different kind. Here, the power is a general and not a limited power. It is in effect a power to appoint in any manner the testatrix might think proper. It is a power, therefore, which comes within the 27th section of the Act; and that being so, I have come to the conclusion that the 33rd section applies; and that the effect of the 33rd section and of the 27th section, taken together, is to prevent a lapse, and entitles the Plaintiff, as the administrator of the deceased daughter of the testatrix, to the share which that daughter would have taken if her death had happened immediately after that of the testatrix.

It is impossible to examine the 27th section of the Act without seeing that it was the intention of the Legislature, by that section, to sweep into a general bequest all property over which the testator had a general power of appointment. And that conclusion accords with the view which the Court has long since adopted in favour of creditors, in cases in which the debtor, having a general power of appointment over property, but no transmissible interest in default of appointment, thinks fit to exercise his power of appointment for the benefit of a third party; where the Court has laid hold of the property in the hands of the third party, and treated it as assets for the payment

of the creditors (a)—a rule which is sometimes stated as if founded upon the appointee in such a case becoming a trustee for the creditor; but it is rather to be referred to this, that, the donee of the power having by his appointment displaced the title of those taking estates subject to the power, and so rendered the property his own absolutely, the Court will treat it in like manner, will follow this out to all its legitimate consequences, and will treat his rights acquired under a general power as equivalent to absolute ownership.

1856.
 BOOLE
 v.
 CHEYNE.
 Judgment.

A similar construction was adopted in a case which occurred under the Annuity Act—the case of *Halsey v. Hales* (b). The Annuity Act had provided, that nothing in the Act contained should extend to any annuity or rent-charge secured upon lands of equal or greater annual value, whereof the grantor was seised in fee simple or fee tail in possession at the time of the grant; and the facts in *Halsey v. Hales* were these: Sir *E. Hales* and his only son had suffered a recovery, and declared the uses to such person and for such estate as they should jointly appoint; and they jointly granted an annuity, and appointed the lands to one *Harcourt* for a term of years, in trust for the annuitant. It was argued, that, neither Sir *E. Hales* nor his son having either a fee simple or fee tail in possession at the time of the grant, but only a power, the case did not fall within the exception in the Act; and *Shrapnell v. Vernon*, before Lord *Thurlow*, was cited. But Lord *Kenyon*, C. J., said, “We are called upon in this case to decide according to the strict letter of the Act of Parliament: but that is not the true line of construction, for Lord *Coke* says, *qui hæret in literâ hæret in cortice*. We must, therefore, consider what is the fair meaning of the Act. I think the object of the Legislature was to prevent persons who had no market-

(a) See *Holmes v. Coghill*, 7 Ves. on Wills, p. 526.
 499; *S. C.*, 12 Ves. 206; 2 Jarm. (b) 7 T. R. 194.

1856.
 {
 ECCLES
 v.
 CHEYNE.
 —
Judgment.

able estates making improvident bargains in granting annuities; but they thought that a person who could bring a real security to market was not subject to such impositions; and therefore they provided, by the last clause, that the Act should not extend to any annuity secured by lands of equal or greater annual value whereof the grantor was seised in fee simple or fee tail. Now, what estate had the grantors of this annuity? They had the power over the fee simple, and it seems as if Lord *Thurlow* thought, in the case cited, that such a case came within the exception of the Act. The grantors had the control over the estate."

The Court therefore, in that case, considered itself entitled, looking to the whole scope of the Annuity Act, to treat a grant of an annuity by persons having a joint power of appointment of the fee, precisely as if such persons had been absolute owners in fee.

Now, looking to the whole scope of the Wills Act, it appears to me to be clear that the Legislature intended to put an appointment by will, in exercise of a general power, upon precisely the same footing as a devise or bequest by a party having an absolute interest. The 27th section enables parties having an absolute power of appointment over property to deal with that property by will as their own absolutely, and to dispose of it by will without reference to their power. If the words they have used to describe the property are sufficient to include it, the devise or bequest is to be construed so as to include such property. That being the effect of the 27th section,—the 27th section having made the words "bequeathed" and "bequest" applicable to property over which the testator has a general power of appointment,—when I come to the 33rd section, I find it enacted, that, upon the death, under the circumstances there described, of a child to whom personal property has been "bequeathed" by a parent, the "bequest" shall not lapse, but shall take

effect as if the death of such child had happened immediately after the death of the testator.

In *Griffiths v. Gale* (a), the late Vice-Chancellor of *England* seems to me to have made some observations which are inapplicable if they go beyond the case before him. He says, in reference to the words "devised" and "bequeathed" in the 33rd section, that "property passing by the execution of a power is neither devised nor bequeathed" (b); that those words and the word "lapse" in the same section "are totally inapplicable to an appointment by deed or will" (c); that, "where property is disposed of by virtue of a power there is no lapse;" and that "the term 'lapse' shews that the Legislature was speaking of a thing that might lapse: it shews that the Legislature was speaking of devises and bequests properly so called, that is, of dispositions of property of which the testator was owner" (d).

But it appears to me, that, in a case like the present, neither the word "lapse" nor the word "bequest" is inapplicable. In a case like this there might well be a lapse. The Legislature having, by the 27th section, extended the meaning of the word "bequest" so as to include property appointed by the testator under a general power, the word "lapse" in the 33rd section should receive a corresponding extension of meaning, and be applicable to a legacy given by an appointment in exercise of the power. The only caution to be observed in applying the statute to the exercise of the power is, not to extend its operation so as to include objects not within the scope of a limited power. Here, the power is general.

The argument with which I was mainly pressed on the part of the Defendants was this: that you cannot, under a

(a) 12 Sim. 327; S. C., 354. (b) Id. 328. (c) Id. 359. (d) Id.

1856.
 {
 ECCLES
 v.
 CHRYNE.
 —
 Judgment.

power, appoint to a deceased party.—I admit you cannot, under ordinary circumstances; but, in a case like this, the 27th section of the Act having provided that a general bequest shall include property which the testator has a general power to appoint; and the 33rd section, that a bequest to a child dying under the circumstances which have occurred in this case, shall not lapse, but shall take effect as if such child had survived the testator; I apprehend that the 33rd section must operate upon such a bequest, that the appointment must take effect, and that the interest of the parties claiming in default of appointment is displaced by such an exercise of the power.

I must therefore declare, that the one-fourth of the produce of the trust estates by the settlement of July, 1831, limited as *Mary Bibby* should appoint, belongs to the Plaintiff as administrator of *Mary Eccles*, deceased, and to *Elizabeth Kidd*, in equal moieties.



June 9th &
 10th.

MACOUBREY v. JONES.

Settlements—
 Portions—
 “Younger”
 Children—
 Accruer—
 Younger Son
 becoming Eldest—Disentailing Deed.

BY the marriage settlement of *Benjamin Evans* and *Easter* his wife, then *Easter Griffith*, dated June, 1813, real estate was limited to the use of *Benjamin*, for life, with re-

A second son, becoming the eldest son in the lifetime of his father, who was tenant for life, with remainder, subject to trusts for younger children's portions, in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother:—*Held*, that he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer in the event of a younger son becoming an eldest son; the Court being of opinion, that, in being excluded by the disentailing deed, he was in effect excluded by the settlement, of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate.

Peacocke v. Paras (2 Keen, 689), observed upon. It is in conflict with *Spencer v. Spencer* (8 Sim. 87), and not to be followed as an authority.

mainder to the use of *Easter* for life; with remainder to trustees during the lives of *Benjamin* and *Easter* and the survivor of them, upon trust to preserve contingent remainders; with remainders to the use of trustees for a term of 1000 years upon the trusts thereafter declared; and subject thereto, to the use of the first son of *Benjamin* and *Easter* to be begotten, and to the heirs of the body of such first son; and in default of such issue, to the use of the second and other sons of *Benjamin* and *Easter* severally, successively, and in remainder, and the heirs of their bodies; with remainder to the daughters of *Benjamin* and *Easter* as tenants in common in tail, with cross remainders in tail, with remainder to the use of *Benjamin* in fee. And as to the term of 1000 years, it was declared, that the same was limited, upon trust, that, in case *Easter* should have issue by *Benjamin* any other child or children besides an eldest or only child, whether the same should be son or daughter, then the trustees at any time after the decease of *Benjamin* and *Easter*, or in their lifetime, or in the lifetime of the survivor, with their, his, or her consent first had in writing, notwithstanding the coverture of *Easter*, should, by sale or sales, mortgage or mortgages, of the term, or of the premises therein comprised, raise and levy the sum of 1000*l.* for the portion or portions of such daughter or daughters, youngest son or sons, of *Easter* by *Benjamin* to be begotten, to be paid to such daughter or daughters, youngest son or sons, in equal shares and portions, when they should respectively attain the age of twenty-one years, or day or days of marriage, which should first happen, in case such ages or marriages happened after the death of *Benjamin* and *Easter*, otherwise, the said respective portion or portions to be raised and paid within twelve calendar months next after the decease of *Benjamin* and *Easter*. And it was thereby provided, that if any such daughter or daughters, younger son or sons, should happen to die without

1856.

MACOUBREY

v.

JONES.

Statement.

1856.
 MACOUBREY
 v.
 JONES.
 ———
Statement.

issue before his, her, or their portion or portions should become payable as aforesaid, or if such younger son or sons should become an eldest son, then the portions of him, her, or them so dying without issue, or becoming an eldest son, respectively, should go, accrue, and be paid to the survivors of them respectively, share and share alike, when the said original portion or portions should become payable as aforesaid.

There was issue of the marriage, *Benjamin Griffith Evans* the first son, *George David Evans* the second son, who was born in 1815, and four other children. *Easter* died in 1828.

In September, 1843, *Benjamin Griffith Evans* joined his father in disentailing the settled estates; and by the disentailing deed such estates were released and conveyed by *Benjamin Evans* and *Benjamin Griffith Evans* to the Defendant *Jones*, for a term of 500 years, subject to a proviso for redemption upon payment by *Benjamin Evans* and *Benjamin Griffith Evans*, or either of them, of 1200*l.* advanced by *Jones* in payment of a debt previously charged on the life estate of *Benjamin Evans*; with remainder to the use of *Benjamin Evans* for life, with remainder to the use of *Benjamin Griffith Evans* in fee.

By the settlement on the marriage of *Benjamin Griffith Evans* with the Plaintiff, dated December, 1843, the estates were settled, subject to the terms and to the life estate of *Benjamin Evans*, to *Benjamin Griffith Evans* for life, with remainder to the Plaintiff for life, with remainder to *Benjamin Griffith Evans* in fee.

In May, 1845, *Benjamin Griffith Evans* died intestate, and without issue. In May, 1849, *Benjamin Evans* died,

having by his will devised the settled estates to his surviving children.

1856.
MACOUBREY
v.
JONES.
Statement.

The bill was for an account of what was due for principal and interest in respect of the 1000*l.* secured by the term of 1000 years, and of what was due to the Defendant *Jones* for principal and interest on her mortgage; and it prayed, that proper directions might be given for raising and distributing the 1000*l.* and interest, and that the Plaintiff might be at liberty to redeem the premises.

The proceedings on the hearing are reported in Mr. *Kay's Reports* (a).

Upon the cause now coming on for further consideration, a question arose, whether *George David Evans*, having thus survived his elder brother and become the eldest surviving son of *Benjamin* and *Easter Evans*, was entitled, under the settlement of June, 1813, to share in the 1000*l.* and interest by that settlement provided for the portions of younger children.

Mr. *James*, Q. C., and Mr. *Southgate*, for the Plaintiff; and

Argument.

Mr. *Bevir*, for the Defendant *Jones*, took no part in the argument.

Mr. *Chandless*, Q. C., and Mr. *Dickinson*, for *George David Evans*, contended, that he was entitled to one-fifth of the 1000*l.* and interest, as a younger son, within the meaning of the settlement.

The period for ascertaining whether he was or was not a younger son, was in 1836, when he came of age and attained

(a) P. 29, nom. *Evans v. Jones*, where the deed of September, 1843, is more fully stated.

1856.
 MACOUBREY
 v.
 JONES.
 Argument.

a vested interest; and in 1836 he was a younger son: *Fry v. Lord Sherborne* (a), *Mocatta v. Lindo* (b).

[The VICE-CHANCELLOR referred to *Chadwick v. Doleman* (c) as adverse to this contention.]

In *Chadwick v. Doleman* the terms of the settlement were different.

But, admitting that he was the eldest son at the period when, according to the settlement, the time had arrived for ascertaining who were younger children, still, not taking under the settlement any interest in the bulk of the settled estates, he is to be deemed a younger son, within the meaning of the provisions for younger children. The settlement shewing an intention to provide, either by the bulk of the estate or by the portions, for all children of the marriage, every child not taking the bulk of the estate is considered in equity as a younger; and eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude from a share in the portions for younger children: *Duke v. Doidge* (d), *Beale v. Beale* (e), *Teynham v. Webb* (f), *Hall v. Hewer* (g), *Pierson v. Garnet* (h), *Matthews v. Paul* (i), *Scarisbrick v. Lord Skelmersdale* (k), *Livesey v. Livesey* (m), *Lyddon v. Ellison* (n).

[The VICE-CHANCELLOR referred to *Peacocke v. Pares* (l) as deciding that a second son becoming an eldest son, but prevented from taking under the settlement by a recovery

(a) 3 Sim. 243.

(b) 9 Sim. 56.

(c) 2 Vern. 528.

(d) 2 Ves. sen. 203, n.

(e) 1 P. Wms. 244.

(f) 2 Ves. sen. 210.

(g) Amb. 203.

(h) 2 Bro. C. C. 38, 47.

(i) 3 Swanst. 328.

(k) 4 Y. & C. 112.

(l) 13 Sim. 33; *S. C.*, on appeal,

2 H. L. Cas. 419.

(m) 19 Beav. 565.

(n) 2 Keen, 689.

suffered in the lifetime of his elder brother, is excluded from a share in the portions.]

1856.
MACOUBREY
v.
JONES.
Argument.

There the portions had not vested when the second son became the eldest, so that there was no divesting a vested interest—a circumstance which the Master of the Rolls considered not immaterial. Here, as in *Spencer v. Spencer* (a), the reverse was the fact (b). Besides, *Spencer v. Spencer* was not cited in *Peacocke v. Pares*.

Mr. Rolt, Q. C., and Mr. Pitman, for three of the younger children, and Mr. Wood for the personal representative of the fourth:—

The period for ascertaining who was the eldest son was at the death of the tenant for life i. e. in May, 1849, and at that time *George David Evans* was the eldest son.

The circumstance that he took no interest in the settled estates, is immaterial. The settlement gave him an interest; and he has lost that interest, not from any fault in the settlement, but in consequence of the disentailing deed,—an instrument distinct from the settlement, and which could not have been in the contemplation of the parties to the settlement at the time when the settlement was executed, or within their intention to provide for: per Lord *Langdale* in *Peacocke v. Pares*.

[The VICE-CHANCELLOR.—Suppose the eldest son had left issue?]

Then, the second would have been excluded by reason of the limitation in the settlement,—by an event which would

(a) 8 Sim. 87.

(b) See 2 Jarm. on Wills, p. 168.

1856.
 MACOUBREY
 v.
 JONES.
 Argument.

clearly have been in the contemplation of the parties to the settlement, and within their intention to provide for.

The argument on the other side extends to this, that, wherever you can say that it is a case of hardship, the Court will relieve an eldest son at the expense of the other children.

[The VICE-CHANCELLOR.—Hardship has nothing to do with the question. It is simply a question of intention.]

In all the authorities cited in favour of the other side, there was clear intention that the parties should not be left without some benefit. Here, there is not.—Besides, *George David Evans* is not wholly without some benefit from the estate. Under his father's will he takes an interest in the estate itself.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

This point is reduced to a very narrow compass. I am under the necessity of choosing between two decisions, the one a decision of the late Vice-Chancellor of *England* in *Spencer v. Spencer* (a), the other that of Lord *Langdale* in *Peacocke v. Pares* (b); both decisions being clearly in point, and the two being as clearly in conflict with each other.

It is now well-established law, that, where the bulk of an estate is settled in strict settlement, and by the same settlement portions are provided for younger children, no child, taking the bulk of the estate by virtue of the limitations in strict settlement, shall take any benefit from the portions. And that is so, whether the settlement does or does not con-

(a) 8 Sim. 87.

(b) 2 Keen, 689.

tain an express provision to exclude him from a share in such portions.

1856.
MACOUBREY
v.
JONES.
Judgment.

But, where a younger child becomes the eldest without taking any part of the estate, cases may arise involving questions less easy to determine, in consequence of the difficulty of ascertaining the intention of the parties by whom the portions were provided.

In the present case, however, there is no difficulty in ascertaining the intention, and the question is a very simple one. The bulk of the property being settled in strict settlement, a term is limited to trustees upon trust to raise portions for younger children, with a provision, that, if a younger son should become an eldest son, his portion is to accrue to the survivors; and the question is, whether the second son, becoming the eldest son in the lifetime of his father, but without taking under the settlement any interest in the bulk of the estate, is entitled to share in the portions.

In cases of this kind, where the intention is clear that no child shall be left without some provision from the settled property, the rule has been, that the Court is at liberty to disregard such words as "younger children" and to admit a younger son, becoming, literally speaking, an eldest son, to participate in portions for younger children, provided he does not take the bulk of the estate by virtue of the limitations in the settlement. The intention of the parties being clearly to provide portions for all children except such as should so take the estate, the Court will carry that intention into effect. And in thus carrying out the intention of the parties, the Court has considered itself at liberty to go further; and in *Duke v. Doidge* (a), where

(a) 2 Ves. sen. 203.

1856.
 MACOUBREY
 v.
 JONES.
 —
Judgment.

there was in the settlement a power to select the son, who was to take the estate, and the third son was selected for that purpose, the eldest son was held entitled to a portion, the Court saying, that "every child except the heir is considered in equity as a younger; and that eldership, not carrying the estate along with it, is considered not such an eldership as shall exclude by virtue of such clauses." That, as far as words go, was a strong decision. In other respects it was a sensible one, the question being, what was the intention of the settlement.

In the present case, so far as regards the period at which it was to be ascertained whether *George David Evans* was or was not the eldest son, I do not concur with what was contended on his behalf, that the period in question was when he came of age and attained a vested interest in the portions. It appears to me, that such period was at the death of the father, or rather, that it would have been at the death of the father in case the disentailing deed had not sooner ascertained that *George David Evans* could never take the estate under the settlement. The strongest authority on this point is the case of *Chadwick v. Doleman* (a), where, as^a here, the father being tenant for life under a marriage settlement, with remainder to trustees to raise 4000*l.* for younger children's portions, but as the father should appoint, and remainder to his first and other sons in tail, the father appointed 2600*l.* to the second son, who, several years afterwards, became the eldest son, and entitled, subject to his father's life interest, to the whole of the estate. The father then made a new appointment of the 2600*l.* to one of his daughters—and there, although the settlement contained no such proviso for accruer as there is in this case, the Court called back the 2600*l.*, and decreed the new ap-

(a) 2 Vern. 528.

pointment to take place. There, the second son had attained, while he was still a younger son, a vested interest in the portion; yet, six years afterwards, the Court called it back on his becoming the eldest son, and as such entitled in remainder to the estate. This point, however, is immaterial in the view which I take of the present case.

1856.
MACOUBREY
v.
JONES.
Judgment.

With the exception of *Peacocke v. Pares* (a), none of the authorities will be found to conflict with the rule, that, where the intention is clear that no child shall be left without some provision, the Court is at liberty to admit to a share in the provisions made for younger children a son who, although he may have become the eldest, does not become entitled to the estate. In *Livesey v. Livesey* (b) there is nothing to conflict with this rule. There, a testatrix, after giving to the eldest son of her daughter *Eliza*, and her husband *Edmund Livesey*, who should be living at the time of her (the testatrix's) decease, ten guineas, adding, that she left him no larger sum because he would have a handsome provision from the estates of her late husband and of the said *Edmund Livesey* (who was still alive), gave a moiety of the residue of her property upon trust for all the children of her daughter *Eliza*, who were then in being or should be thereafter born, except her eldest son or such of her sons as should, by the death of an elder brother, become an eldest son, equally to be divided amongst them, and the survivors or survivor, when the youngest should attain twenty-one. At the death of the testatrix, the eldest son was provided for from the estates mentioned in the will, but died without issue before the youngest child attained twenty-one. The second, who then became the eldest son, did not succeed to the provision which had been made for the eldest son: and there it was held, that the second son,

(a) 2 Keen, 689.

(b) 2 H. L. Cas. 419.

1856.
MACCUBERTY
v.
JONES.
—
Judgment.

being the eldest son at the time the youngest child attained twenty-one, was excluded from a share in the moiety of the residue. But the reasons for that decision are thus stated by Lord *Cottenham*, C.: "It is said, that this results not only in hardship but in absurdity, because she has in another part of the will stated the reason why she excludes the eldest son, that is, the eldest son living at the time of her own death. She gives small legacies of ten guineas to her daughter and the eldest son of her daughter who shall be living at her decease, 'because they have and will have a handsome provision from the estate of her late husband and the estate of *Edmund Livesey*,' he being then alive. It might, of course, be perfectly uncertain whether they would take anything under the will of *Edmund Livesey*, but the provision under the will of her deceased husband no doubt was a fact ascertained, and therefore applicable to the party being the eldest son. Now, if that was the reason, (and it may for anything that appears have been her motive originally), she has not carried out that intention, and she has not, in the other parts of the will, been influenced by that motive, or, if she was, she has totally mistaken the way of carrying it into effect; because then she would have excluded not any son who might, at any time before the event described, have become an eldest son, but she would, in the terms of this last clause, have saved and excepted her eldest son, (that might be her eldest son then living), or such other son as should be an eldest son at the time of her death. That is the way she would have expressed herself if she had intended to frame these two provisions so as to exclude an eldest son, who, being such eldest son, would take the provision to which she refers at the commencement of her will; but she not only abandons that in this clause, but she entirely abandons it when she comes to the daughter, for she equally makes an exclusion of an elder daughter, although that daughter would take nothing under the will of her grand-

father, or might not have taken anything under the will of the living man *Edmund Livesey*. So that she has neither in the one instance nor the other, if that was her intention, carried out that intention"(a). And he then goes on to say, in effect, that the words used being plain and not expressing the intention attributed to them, the House could not go into a speculation as to the intention, and do violence to words which were so plain, upon an assumption as to what it was probable that the testatrix intended.

1856.
MACOUBREY
v.
JONES.
—
Judgment.

In *Livesey v. Livesey*, therefore, Lord *Cottenham* does not throw any doubt upon the doctrine as I have stated it—on the contrary, he recognises that doctrine entirely, but says it does not apply to the case before him.

The same remark is applicable to the case of *Matthews v. Paul* (b). That was a case in which the intention (if the testatrix entertained any intention) of admitting a second son, in case he became an eldest son without taking an estate, limited, but not by her will, to his elder brother, to a share in the provisions made by her will for the children of her daughter "except an eldest son," could not be gathered from the will; and the will was the only instrument at which the Court was at liberty to look for the purpose of ascertaining what her intention was.

The authorities, therefore, being so far in accordance with each other, the real question in this case is raised by the disentailing deed which has been executed. And, upon this question, as I have already said, the decision of Lord *Langdale* in *Peacocke v. Pares* (c), and that of Sir *L. Shadwell* in *Spencer v. Spencer* (d), are directly in conflict.

(a) 2 H. L. Cas. 434—436.

(b) 3 Swanst. 328.

(c) 2 Keen, 689.

(d) 8 Sim. 87.

1856.
 MACOUBERTY
 v.
 JONES.
 —
Judgment.

Lord *Langdale's* decision is briefly this: that, when it is said that an elder child, unprovided for, shall be deemed a younger, it must mean an elder child unprovided for by the settlement or will itself, or by means which were in the contemplation of the parties making the settlement or will. In the case before him the second son, if the estate tail in the eldest son had not been barred, would, on the death of his elder brother without issue, have become entitled, under the limitations in the settlement, to an estate tail in the settled lands, and becoming so entitled he could not have taken the estate and a portion also. He was deprived of that estate, but he was deprived of it, not by any defect of the settlement itself, but by the recoveries which had been suffered; and the event of such recoveries being suffered was one which, in his opinion, could not reasonably be considered to have been in contemplation when the settlement was made (a). He admits that the presumption, that it was intended to provide for all the children of the marriage, "is always to be had in view, and ought to be acted upon, in all cases in which a loss of provision occurs by an event which can properly be supposed to have been in the contemplation of those by whom the settlement was made, and within their intention to provide for" (b); but a recovery he does not consider to be an event of that description.

Sir *L. Shadwell* in *Spencer v. Spencer* (c)—a case precisely similar to that before Lord *Langdale*,—held that a second son who became an eldest son, but was prevented from taking the estate by a recovery suffered in the lifetime of his elder brother, was entitled to share in the portions provided by the settlement for all the children of the marriage "except an eldest or only son." "It is plain," he said, "that *Frederick*

(a) Per Lord *Langdale*, M. R.,
 2 Keen, 699, 700.

(b) 2 Keen, 700.

(c) 8 Sim. 87.

Charles Spencer " (the son in question) " must be taken not to have been ' an eldest or only son ' in the sense in which those words are used in this settlement. What the parties meant was, that a child who should take the estate by virtue of the limitations of the settlement, should not have a portion, but that all the other children should have portions. It is established by a series of cases, that, in deciding on questions like the present, you are to look at the instrument itself, and see what the real meaning of the parties was "(a).

1856.
 MACOUBREY
 v.
 JONES.
 Judgment.

Now it seems to me, that in the case before me, as in the case before Sir *L. Shadwell*, the true intention of the parties to the settlement was to exclude from a share in the portions not every child becoming an eldest son, but every child, who, so becoming an eldest son, became also entitled to the settled estate. And I think, that, upon the authority of that case, 'I am at liberty to differ from the view taken by Lord *Langdale* in *Peacocke v. Pares*, and to hold that the second son becoming an eldest son, but prevented by the disentailing deed which has been executed from taking under the settlement the settled estate, is not excluded from a share in the portions. It does seem to me a fallacy to say that the party who takes the fee under a recovery, or, as here, under a disentailing deed, does not take under the settlement, or that the younger son, who by the recovery is excluded from taking, is not excluded by the settlement. The recovery is an incident to the settlement, and an incident from which it cannot be exempted. You cannot settle in strict settlement except in a way which exposes the estates tail to the liability of being barred. The parties know this when they make the settlement; and I cannot concur with Lord *Langdale* in viewing the recovery by which it is barred, " as an event which cannot reasonably be sup-

(a) Per Sir *L. Shadwell*, V. C. E., 8 Sim. 99.

1856.
 MACOUBREY
 v.
 JONES.
 ———
Judgment.

posed to have been in contemplation at the time when the settlement was made." Then, when the second son becomes the eldest, and finds his estate thus barred, I think that he is entitled to a portion as a younger son. It is "by virtue of the settlement" that the estate has been enjoyed in fee by the eldest son, through the instrumentality of the recovery or disentailing deed; and in like manner, it is "by virtue of the settlement," that the second son, on becoming an eldest son, finds himself excluded from the estate tail, to which, but for such recovery or disentailing deed, he would have been entitled; and the second son so becoming an eldest, and finding himself excluded, cannot, I apprehend, be held to be an eldest son within the meaning of the provisions that no eldest son shall be entitled to a portion.

Suppose, to illustrate it by a parallel case, that, instead of executing this disentailing deed, the eldest son had left issue, the second son surviving his elder brother would equally have become the eldest son surviving; and yet, in such a case, it would be impossible to dispute his right to a portion.

In reference to the mortgage to which, in this case, the reversion in fee of the eldest son was subjected by the disentailing deed, to shew that the Court does not take a narrow view as to what is meant by taking under a settlement of this description, I may mention a case which Lord *St. Leonards*, C., described as one of first impression—the case of *Harrison v. Round* (a). There, by a settlement, two estates, the *Copford Hall* estate and the *Overhall* estate, were limited to the father for life, and subject thereto the *Copford Hall* estate was limited to the first and other sons in tail male, and the *Overhall* estate was limited to the second and other sons in like manner; and it was provided, that, if the second son should become an eldest son, and as such

(a) 2 De G. M'N. & G. 190.

should become entitled to the actual possession, or to the receipt of the rents and profits of the *Copford Hall* estate, the limitations of the *Overhall* estate should cease and determine as if such second son were dead without issue. The second son became the eldest, and joined his father in suffering a recovery of the *Copford Hall* estate, the uses of which were declared to the joint appointment of the father and son, and subject thereto to the old uses. In exercise of this power the father and son, by a mortgage in fee of the *Copford Hall* estate, raised a sum of money, which was paid to the father and son, and Lord *St. Leonards* held, that, on the death of the father, the *Overhall* estate shifted from the second son under the terms of the proviso contained in the settlement; and that, notwithstanding both the recovery and the mortgage, the second son came, on the death of his father, into possession of the *Copford Hall* estate, within the meaning of the terms of the settlement. He took that estate subject to the charge, "but he took it in point of truth and actual fact under the limitations of the settlement" (a). It could not be said, because he had anticipated a portion of the estate, that the estate itself had not come to him under the limitations of the settlement, and within the meaning of the proviso (b). He had got, in point of fact, the whole benefit of the charge, and when the estate fell into possession, and the charge actually came upon him, it could not be said that he had the estate burthened beyond the benefit which he had received. The charge was created by himself, and he had had the full benefit of it. The argument was, that the recovery and mortgage were in defeasance of the settlement; he considered them to be "under the settlement, in pursuance of the settlement, and consistently with the settlement" (c). I merely cite that case as one instance that the Court does not take a narrow view in cases of this description.

1856.
 MACCUBREY
 v.
 JONES.
 Judgment.

(a) 2 De G., M'N. & G. 202. (b) Id. 204. (c) Id. 205.

1856.
 MACOUBREY
 v.
 JONES.
 Judgment.

It appears to me, notwithstanding *Peacocke v. Pares* (a), that, in this case, *Benjamin Griffith Evans*, taking under the disentailing deed the reversion in fee simple in the settled estates, though charged by that deed with his father's mortgage debt, did in fact take under the settlement; and in like manner, that *George David Evans*, being by that deed excluded from taking, was in effect excluded by the settlement. I think, that, if in this case I followed the authority of *Peacocke v. Pares*, I should be going backward in an important branch of the law of this Court.

Minute.

DECLARE, that the Defendant *George David Evans* is entitled to one-fifth of the 1000*l.* and interest. Pay the amount certified to be due on the 1000*l.*, and subsequent interest, (to be verified by affidavit), equally between the five children.



(a) 2 Keen, 689.

July 2nd.

VARLEY v. WINN.

Will—Lapse
 —Executory
 Bequest—Investment—
 Interest.

JOHN VARLEY, by his will, dated in 1849, after appointing the Plaintiffs and *Samuel Musgrave* executors thereof, and after directing the payment of all his just debts,

If there be an executory bequest of personalty depending either upon the determination of a preceding limited interest, or upon a collateral event defeating an interest previously given, and such limited interest determine, or such collateral event happen during the lifetime of the testator, the executory bequest does not lapse.

Accordingly, where there was a bequest to the testator's five daughters of 6000*l.* each, to be invested by the executors within seven years from the testator's death, "in trust for them or their children, but if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue, share and share alike, as they arrive at the age of twenty-one years; and if only one, the whole to go to that one only." One daughter died without issue in the lifetime of the testator:—*Held*, that the 6000*l.* given to her passed by the gift over to those of the testator's daughters who were living at his death, and had issue then living, absolutely.

Held, also, that the words above printed in italics ought to be read as though in a parenthesis.

Held, further, that as the estate was sufficient to pay them at the testator's death, interest must be paid upon the legacies from a year after the testator's death, the direction for investment being for the convenience of the estate, and not for the benefit of the residuary legatees.

funeral and testamentary expenses, gave and bequeathed as follows:—"I give and bequeath unto my executors all my household furniture, books, plate, linen, china, and other effects of household whatsoever, in or about my dwelling-house at the time of my decease, to be divided equally betwixt all my children, share and share alike. I give to each of my daughters *Esther, Hannah, Ann, Harriet, and Sarah Elizabeth*, 1000*l.*, to be paid to them respectively at the end of one year from the time of my decease, without interest. I also give unto each of my five daughters aforesaid the sum of 2000*l.*, to be paid to them respectively within four years after my decease, the interest to be paid half-yearly at 4*l.* per cent. per annum, to be computed from the end of one year after my decease. I also give unto my five daughters a further sum of 6000*l.* each, which said sum of 6000*l.* to each of them shall be invested in real or Government securities by my executors within seven years, to be computed from the time of my decease, but such investment shall be in the names of my executors, in trust for them or their children; *but if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue*, share and share alike, as they arrive at the age of twenty-one years; and if only one, the whole to go to that one only. And as my son *Richard Varley* is dead and has left issue, I give and bequeath unto my executors, in trust, until such child or children arrive at the age of twenty-one years, the sum of 10,000*l.*, to be invested in real or Government securities within one year after my decease, and the interest arising to be appropriated to the maintenance and education of such child or children of the said *Richard Varley*; but if they should die before they attain the age of twenty-one years, then the sum of 10,000*l.* so invested to be divided among the surviving children of the brothers and sisters of the said *Richard Varley*, share and share alike, and if one only, then to that one; and as to all the rest, residue, and remainder of my estate, property, and effects whatsoever and where-

1856.

VARLEY

v.

WINN.

Statement.

1856.
 VARLEY
 v.
 WINN.
 Statement.

soever, and of what nature or kind soever not hereinbefore disposed of, and subject to the payment of the legacies or sums of money hereinbefore given or bequeathed to and for my said daughters and children of my son *Richard* before named, I give, devise, and bequeath the same unto and equally between my two sons, *William Varley* and *Samuel Varley*, their several heirs, executors, administrators, and assigns respectively, to be held in common by them as long as they are agreed; and if at any time they cannot agree, then the same shall be divided by and between them; but if the division cannot be made to their mutual satisfaction, the same or that part on which they are not agreed shall be sold by private contract or public auction, and the proceeds arising from such sale or sales shall be divided by and between them, share and share alike. And, further, my executors shall not be answerable for any loss or damage, unless the same shall arise from their own respective wilful fault or neglect. And lastly, I hereby revoke all former will and wills by me at any time heretofore made, and declare this only to be my last will and testament."

John Varley died on the 30th of June, 1855, leaving two sons and four daughters surviving him, namely, the Plaintiffs *William Varley* and *Samuel Varley*; and the Defendants, *Hannah*, the wife of *Joseph Winn*; *Ann*, the wife of *Obadiah Nussey*; *Harriet*, the wife of *John Light*; and *Sarah Elizabeth*, the wife of *Isaac Lord*; all of whom, some years before the date of the will, had attained the age of twenty-one years.

The said testator had two other children, *Richard Varley*, his eldest son, (who died prior to the date of the said will, leaving his only child, the Defendant *John Varley*, an infant surviving), and *Esther Vickers*, who was at the date of the said will a widow without issue, and who afterwards died without issue during the lifetime of the said testator, on the 6th day of June, 1853.

Mr. Willcock, Q. C., and Mr. Dury, for the Plaintiffs:—

The legacy to *Esther* lapsed by her death without issue in the testator's lifetime: 2 *Jarm.*, 2nd edit., 671, and cases there cited, *Smith v. Stewart* (a).

1856.
VARLEY
v.
WINN.
Argument.

Mr. Daniel, Q. C., for Joseph Winn and Hannah his wife.

Mr. James, Q. C., for John Varley.

Mr. Cairns, Q. C., and Mr. Baggallay, for Isaac Lord and his wife.

Mr. G. L. Russell for Nussey and wife:—

There was no lapse, but the gift over took effect. In *Edwards v. Edwards* (b), the Master of the Rolls puts this case: a gift to A., and if he shall die without leaving a child, then to B. . . . There the event spoken of on which the legacy is to go over, is not a certain but a contingent event; it is not in case of the death of A., but in case of his death without children; and here it would be importing a meaning and adding words to the will, if it were to be construed to import as a condition which was to entitle B. to take, that the death of A. without children must happen before some particular period. In these cases, therefore, it has always been held, that if at any time, whether before or after the death of the testator, A. should die without leaving a child, the gift over takes effect and the legacy vests in B." And the decision in the case of *Re Sheppard's Trust* (c) is in accordance with this principle.

Mr. Rolt, Q. C., for the children of Mr. and Mrs. Nussey:—

In the cases referred to in that part of *Jarman* on Wills,

(a) 4 De G. & S. 253. (b) 15 Beav. 361. (c) 1 Kay & J. 269.

1856.
 VARLEY
 v.
 WINN.

Argument.

which has been cited for the Plaintiffs, the interests which lapsed were absolute, and there was no gift over in the events which had happened.

Mr. *Fooks* for the child of Mr. and Mrs. *Isaac Lord*:—

In *Ive v. King* (a), the Master of the Rolls states, that if there be a legacy to a class, and a gift, in case of the death of any before the period of distribution, to their respective issue, if one of the class be dead at the date of the will or at the death of the testator, the issue of that one cannot take anything.

“But if the original legacy be not to a class but to a named individual legatee, with a direction, that, in case of the death of the legatee before payment, the legacy is to go to another person, although the death of the legatee occurs before the death of the testator, the gift over takes effect, upon the presumption, that such ulterior legatee was substituted in order to prevent a lapse of the legacy.”

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

My difficulties, in this case, are on the words of the will, and not upon any of the authorities; and therefore I do not know that I should gain anything by further consideration, after having heard it so fully discussed. The first question is, what interest the several daughters take in the 6000*l.* legacies; and it appears to me to be clear, that, whatever mode of construction be adopted, whether it is taken as an alternative gift in trust for the daughter if she be living at the testator's death, or if she be then dead for her

(a) 16 Beav. 53.

children if she have left any; or whether it be taken, reading the word "or" as "and," as a gift in trust for the daughter and her children, which, under several authorities, and particularly from the effect of the words which follow in the will, would be a settlement for her life with remainder to her children, I say, that, taking either construction, it is quite clear to me that the daughter's share, though vested, would be subject to be divested by her dying at any period without leaving issue; for the gift over is, "but if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those surviving." Therefore, the testator contemplated the fund being in a state of investment, and that his daughter (though I do not think it necessary to decide this at the present moment) possibly would have the entire interest, liable to be divested only in the particular event happening—which it is suggested might never happen—namely, of there being any surviving daughter who had issue; but, at all events, the gift was to be divested in the event of her dying without issue, should such an event as that occur. Therefore, it is plain that none of the daughters can claim at this moment to take any share absolutely.

Then, it is only necessary to consider this construction with reference to its influence on *Elizabeth's* share. I apprehend the rule as to lapsing may be correctly represented thus: that whenever there is an interest limited by will, either by way of remainder or by way of executory interest, if all the preceding estates have been taken out of the way, or if the events on which the executory interest is limited have taken effect, it is immaterial whether this has occurred in the lifetime of the testator or after his decease. In other words, the parties interested under the gift over are entitled to the executory interest, whether the event upon which the executory bequest was to depend occurred in the lifetime of the testator or afterwards, provided of course, always, that

1856.
 VARLEY
 v.
 WINN.
 Judgment.

1856.
 VARLEY
 v.
 WINN.
 Judgment.

the rule as to perpetuity be observed. In the particular case before me, it seems clear then, that the share has not lapsed, because the event I apprehend is this—the daughter does not take in any sense, as it was argued, an absolute interest—she takes an interest either to herself for life, with remainder to her children, and if there be no children then over, which would be a series of limitations in remainder, or she takes the entire interest, but qualified with an executory limitation over in the event of her dying without leaving children at her decease. Now, if the event on which that executory limitation depends occur in the lifetime of the testator, so that the period has arrived at which the parties interested in remainder, subject to the event, would take, then, as I said before, every one of the authorities shews, that it is a matter perfectly immaterial that that event should so have occurred during the testator's lifetime. I think the case of *Walker v. Main* (a) was as strong in its terms as any. In that case the testator devised his real estate to his wife for life, and after her decease, he gave the same property, which was not to be converted till then, to trustees in trust for sale, and to pay the produce of the sale to the children and grandchildren in certain shares, "to be respectively paid at twenty-one, or marriage; but if any of my said children or grandchildren shall happen to die before the time of such legacy becoming due and payable," then it was given over to the others, and two of them died in the lifetime of the testator, and it was held, that the gift over of their shares took effect. There are innumerable instances of the same kind, all exemplifying the same rule, that, if there be an estate in remainder, and the preceding estate is taken out of the way, or if there be a limitation over on a certain event happening, the executory legatee is entitled to the property, whether such event happen before or after the death of the testator. Then

(a) 1 J. & W. 1.

this deceased legatee was to take either to herself for life, with remainder to her issue, or she was to take the entire interest, liable to be defeated in a given event: that given event has happened, and accordingly the gift over takes place.

1856.
 VARLEY
 v
 WINN.
Judgment.

The next question is, who are to take under the gift over; and although it does seem capricious, I can see some reason for saying that the parties who were to take by the gift over were to be the surviving children who had issue; it seems capricious to say so, if there is no limitation to the issue, and it is very difficult to find any limitation to the issue in this gift over; but it is not utterly absurd, because the testator might suppose, that those of his daughters who had families would want a larger provision than the daughters who had none. As to the words, I have not the least doubt that they cannot, in any sense, be brought to have the meaning assigned to them in argument. It is not a question of ambiguous grammatical reference, which, according to the sound rules of grammar, ought to be applied in one way, and yet is capable of another application; but it is the case of words which cannot in any way be applied to the issue, or to any but the daughters, the gift over being this: "if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those surviving who have issue" It is a distinct phrase, it is not only the word "those," but a distinct antithesis between the class who die without issue, and the others surviving who have issue: he gives the share of the child in the one class over to those who represent the other class.

As to those words, which certainly create a difficulty, "when they arrive at the age of twenty-one years, and if only one, then to go to that one only," I expressed my doubts whether there had not been a slip in the will; but it appears to me that they are capable of a grammatical construction by reading the whole bequest thus: that the share is to be

1856.
 VARLEY
 v.
 WINN.
 Judgment.

"in the names of my executors, in trust for them or their children;"—then stop, and put a parenthesis—"and if any of my daughters should die having no issue, then the share or portion so invested shall be divided amongst those surviving who have issue,"—and end the parenthesis there, and the original sentence will continue,—“share and share alike, as they arrive at the age of twenty-one years; and if only one, the whole to go to that one only.” That would be to those children who arrived at the age of twenty-one years, share and share alike; and if only one, then the whole to that only one. It seems to me, in that way, I may make reasonable sense of the whole will; and all I have now to do is to declare that there is no lapse, and that these sums ought now respectively to be invested in the names of the trustees in trust.

The 6000*l.* legacy to either will go to those daughters who are living and have children; that is to say, in the events that have happened, to *Mrs. Nussey* and *Mrs. Lord*, absolutely, for their own benefit.

Mr. Daniel, Q. C.—There is a question of interest.

The VICE-CHANCELLOR.—The executors say they have assets in hand sufficient for the payment of them all, not perhaps for the purpose of immediate payment of the legacies; but the question of interest is involved in that: assuming that they had assets in hand actually realised, my opinion would be, that the postponement is simply for the convenience of the testator's estate, and not for the benefit of the residuary legatee, but for the purpose of giving the executors time to collect and get in the assets. There is a degree of doubt raised upon it, I concede, by the preceding gifts, which direct the payment to be within four years, and do contain a clear and direct statement as to interest; but I think that amounts to no more than this: the testator does

not give interest if his estate will not allow his executors to invest these sums within seven years. It seems to be their duty to invest them within seven years if they can. The testator saw very possibly that there might be a difficulty in that; I do not conceive that they are bound, of course they would not be bound to pay them if they had not the money, and there may be reversionary interests or other portions of the testator's property not bearing interest. This point must depend on whether or not the executors are in a condition to make an immediate payment; if they are, I think it ought to be done. The interest must be at 4*l.* per cent. from a year after the testator's death. The costs must come out of the estate.

1856.
 VARLEY
 v.
 WINN.
 —
Judgment.

LANTSBERY v. COLLIER.

May 26th;
June 11th.

A SPECIAL CASE.

William Manning, on the marriage of his daughter *Eli-zabeth* with one *Lomas* in 1806, settled real estate, by indentures of lease and release of that date, to the use of *James*

Settlement—
Collateral
Power of Sale
—Perpetuities
—Remoteness
—Trustees—
Discretion.

A father, on the marriage of his daughter in 1806, settled real estate upon trusts for the separate use of his daughter for life, with remainder in case she survived her husband (which event happened) to her children, as tenants in common in tail, and limited the reversion to himself in fee. The settlement contained a collateral power of sale not in terms restricted as to time. In 1850, the daughter's issue being spent, and the daughter being a widow and more than seventy years of age, the trustee executed a deed purporting to be made in exercise of the power, and to be a conveyance of the fee simple:—*Held*,

1st. That the power was valid and subsisting at the date of the deed of 1850.

2ndly. That it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it, in the events which had happened, to the daughter absolutely.

Observations on *Ware v. Polhill* (11 Ves. 257), and review of the authorities respecting collateral powers of sale not in terms restricted as to time. The Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple be limited after estates tail or after estates for life, will hold the power to be a valid and subsisting power until the estates tail (if any) are barred, or the fee simple vested in possession:—in either of which events the purpose of the settlement is spent, and the power ceases.

1856.
LANTSBERY
v.
COLLIER.
Statement.

Manning and Samuel Tilley, and their heirs, for the joint lives of *Lomas* and *Elizabeth*, upon trust for the separate use of *Elizabeth*; and after the decease of *Lomas*, in case he should die in the lifetime of *Elizabeth*, (which event happened), to the use of *Elizabeth* and her assigns for her life, with remainder to the use of *James Manning* and *Samuel Tilley* during the life of *Elizabeth*, upon trust to preserve contingent remainders, with remainder after the death of *Elizabeth*, in case she should survive *Lomas*, to the use of the children of *Elizabeth* by *Lomas* or any after-taken husband, as tenants in common in tail, with cross-remainders between them in tail, with remainder to the use of himself, his heirs and assigns, for ever. And it was by the indenture of release declared, that *James Manning* and *Samuel Tilley*, and the survivor of them, and the executors or administrators of such survivor, should at any time or times thereafter, at the request of *William Manning* during his life, to be signified in writing under his hand and seal, and after his decease it should be lawful for *James Manning* and *Samuel Tilley*, or the survivor of them, his executors or administrators, of their or his own proper authority, absolutely to sell and dispose of and convey the whole or any part or parts of the hereditaments and premises thereby granted, with the appurtenances, and the inheritance thereof in fee simple, to any person or persons whomsoever, for such price or prices in money as to *William Manning*, during his life, and after his decease as to *James Manning* and *Samuel Tilley* or the survivor of them, or to the executors or administrators of such survivor, should seem reasonable; and that, for the purpose of effectuating such sale or sales, disposition or dispositions, and conveyance or conveyances, (but not for any other purpose), it should be lawful for *James Manning* and *Samuel Tilley*, and the survivor of them, and the executors or administrators of such survivor, upon such request of *William Manning* during his life as aforesaid, and after his decease of the proper authority of the

said trustees or the survivor of them, his executors or administrators as aforesaid, by any deed or deeds, instrument or instruments in writing, sealed and delivered by them or him in the presence of and attested by two or more credible witnesses, absolutely to revoke, determine, and make void all or any of the uses, trusts, estates, powers, provisions, declarations, and agreements in and by the indenture of release limited, expressed, and declared of and concerning the hereditaments and premises which should be sold as aforesaid, (except the subsisting leases, if any such should then have been made by virtue of a power thereinbefore contained); and by the same or any other deed or deeds, instrument or instruments in writing, to limit, direct, declare, and appoint any new or other use or uses, estate or estates, trust or trusts of the hereditaments and premises so sold. The release also contained a power for *James Manning* and *Samuel Tilley*, and the survivor of them, and the executors or administrators of such survivor, to give receipts for the purchase-money, providing that such receipts should be sufficient discharges, in the usual form. And it was thereby declared, that, when the hereditaments and premises, or any part or parts thereof, should be sold, the monies arising by such sale or sales should be by *James Manning* and *Samuel Tilley*, and the survivor of them, and the executors and administrators of such survivor, by and with the consent and approbation of *William Manning* during his life, and, after his decease, of *Elizabeth* alone, notwithstanding her coverture, to be signified by writing under his or her hand and seal, and after the decease of both *William Manning* and *Elizabeth*, then of the proper authority of the said trustees, or of the survivor, his executors, or administrators, laid out and invested as therein mentioned in the names or name of the said trustees or trustee, with power for them or him, with such consent and approbation as aforesaid, or of their own proper authority, as the case might be, to vary such investments. The release contained a declaration of trust of

1856.

LANTSBERY

v.

COLLIER.

Statement.

1856.
 LANTSBERRY
 v.
 COLLIER.
 Statement.

certain personal property, which was also settled by *William Manning*, and of the purchase-money to arise from a sale under the power, for the separate use of *Elizabeth* during her life, with remainder, in the events which happened, at the absolute disposal of *Elizabeth* by will.

Lomas died in 1813, leaving *Elizabeth* surviving, who did not marry again.

There was issue of the marriage two children only, *Elizabeth* who died in 1835, without having had any issue, and *Mary*, who died in 1834, having had issue one son, who died before 1850 under twenty-one, and without having been married. The estate tail was not barred by either of the daughters.

William Manning died in 1815. The trustees also died, and new trustees were appointed under a power for that purpose in the settlement.

In 1850, *Edward Lantsbery*, who was the then sole surviving trustee, contracted to sell the real estate to the Plaintiff, and executed an indenture of that date, purporting to be made in exercise of the powers of revocation and of sale contained in the release of 1806, and to be a conveyance of the premises by *Edward Lantsbery* to the Plaintiff in fee simple. At the date of this deed and of the contract for sale, *Elizabeth*, the tenant for life, was living, and was upwards of seventy years of age.

The Plaintiff having afterwards agreed to sell the premises to the Defendant, the latter objected to the title, on the ground, that, in 1850, there was not any power of sale subsisting under the settlement of 1850, which *Edward Lantsbery* could exercise so as to vest in the Plaintiff the premises thereby expressed to be conveyed.

The questions for the opinion of the Court were—

1st. Whether the power of sale contained in the indenture of release of 1806, of the hereditaments therein comprised was a valid and subsisting power at the date and execution of the indenture of 1850, having regard to the events which had then happened; and if so, then,

2ndly. Whether such power was well exercised by the indenture of 1850, and whether the hereditaments comprised in such indenture were thereby effectually vested in the Plaintiff for an estate in fee simple, discharged from the limitations of the indenture of release of 1806.

1856.
LANTSBERY
v.
COLLIER.
Statement.

Mr. Dart for the Plaintiff:—

Argument.

At the date of the indenture of 1850 there was a valid power of sale vested in *Edward Lantsbery* as surviving trustee under the settlement of 1806. That power was well exercised by the indenture of May, 1850; and the Plaintiff took under that indenture an estate in fee simple in the premises.

Powers of sale collateral to estates tail do not fall within the rule against perpetuities, because the estates tail may at any time be destroyed by a recovery: *Biddle v. Perkins* (a), *Powis v. Capron* (b), *Waring v. Coventry* (c), *Wallis v. Freestone* (d). Here estates tail were limited by the settlement of 1806; and although in May, 1850, when the power was exercised, the issue in tail was spent, and the mother upwards of seventy, yet the Court will not, in a case like the present, presume issue impossible. Co. Litt. lib. 1, cap. 3, sec. 32; *Sugden's Vendors and Purchasers*, p. 307.

(a) 4 Sim. 135.

(c) 1 My. & K. 249.

(b) Rolls, May 5, 1830; 4 Sim.

(d) 10 Sim. 225.

138, n.; and see 1 My. & K. 252.

1856.
 LANTSBERRY
 v.
 COLLIER.
 —
Argument.

But even if the Court should presume issue impossible, and read this as if it were a limitation to the mother for life, with remainder to *William Manning* in fee, without the intervention of any estate tail, still the cases cited on the former point are authorities that the title is good. See also *Cole v. Sewell* (a), *Briggs v. Earl of Oxford* (b), *Boyce v. Hanning* (c), *Wood v. White* (d), *Nelson v. Callow* (e).

Besides, there is nothing to prevent the Court from apportioning the power.

Ware v. Polhill (f) will be cited contra. But there the estates in question were leasehold, and had vested absolutely in the first quasi tenant in tail. Lord *Eldon's* decision that the power was bad quoad leaseholds so situated, does not touch a case where, as here, the property is freehold. See 2 Sug. Pow. pp. 467, 468, and *Briggs v. Earl of Oxford* (g).

THE VICE-CHANCELLOR.—What does Mr. *Preston* mean when he says in his work on Abstracts of Title, that the power is good as to the estates for life, and also as to estates tail, “and is void as to the remainder or reversion in fee when it falls into possession or is discharged from the estates tail” (h)?

Mr. *Dart*.—When the fee simple is vested in possession by whatever means,—whether by the expiration or sooner determination of the preceding estates, and whether such preceding estates be for life or in tail,—then the power is void;—then there are persons who, if the legal estate had

(a) 4 Dr. & W. 1.

(b) 1 De G. M’N. & G. 370.

(c) 2 Cr. & J. 334.

(d) 4 My. & Cr. 460.

(e) 15 Sim. 353; 2 Sugd. Pow.,

edit. 7, pp. 469—472; 1 Jarm. on Wills, p. 236.

(f) 11 Ves. 257.

(g) 1 De G. M’N. & G. 370.

(h) Vol. 2, p. 158.

been in the trustees, would have been in a position to call for a conveyance of it, the end or object of the settlement being attained. But till then the power is valid, and may be exercised.

1856.
 LANTSBERY
 v.
 COLLIER.
 Argument.

Mr. *C. G. Smith*, for the Defendant, insisted on the objection taken by the Defendant to the Plaintiff's title. The power, not being in terms restricted within the legal limits of a life or lives in being and twenty-one years afterwards, was bad in toto: *Ware v. Polhill* (a), and *Ferrand v. Wilson* (b). In a previous power in the settlement,—a power to grant leases,—the period for the exercise of the power was in terms restricted within legal limits.

Mr. *Dart* in reply.

The VICE-CHANCELLOR.—How do you meet the objection founded on the apparent capriciousness of a settlement which would enable the trustee, by exercising this power to alter the devolution of the property? If unsold, the reversion in fee is limited to the settlor. If sold, the widow takes, in the events which have happened, an absolute interest in the proceeds of the reversion.

Mr. *Dart*.—Both take alike under the settlement. The trustee is trustee for the tenant for life as well as for the reversioner. The settlor may have wished his trustees, if they had the opportunity of augmenting his daughter's income, to do so, and that would not be open to objection on the ground of caprice. Besides, even if it be caprice to give trustees so large a discretion, this trustee acting *bonâ fide* will be allowed to exercise it, although by so doing he may alter the ownership: *Clark v. Seymour* (c), *Giles v. Homes* (d), *Kekewich v. Marker* (e).

(a) 11 Ves. 257.

(b) 4 Hare, 344.

(c) 7 Sim. 67.

(d) 15 Sim. 359.

(e) 3 M'N. & G. 311.

1856.
 LANTSBERY
 v.
 COLLIER.
 Argument.

The VICE-CHANCELLOR.—There the power was exercised for the purposes of the settlement. Here it would seem as if its exercise had been solely for the purpose of altering the devolution of the estate.

Judgment reserved.

June 11th. VICE-CHANCELLOR SIR W. PAGE WOOD:—

Judgment.

The question in this special case is, as to the validity of a power of sale created by a marriage settlement, the nature of which may be stated, in the events that have happened, to be this—real estate is limited upon trust for the wife for life, (I now put out of consideration the husband's interest, which was determined by his death in her lifetime), with remainder to her children, either by her then intended or any future husband, as tenants in common in tail, and then the reversion is limited back to the settlor, the father of the lady, in fee. There are also trusts declared with reference to personal estate, (which was also settled by the father), and with reference to the moneys to arise from a sale under the power in question, for the benefit of the wife for life, with remainder, in the events which have happened, at the absolute disposal of the wife, by will.

Such being the nature of the settlement, there is contained in it this power. [His Honor read the power of sale, and the direction for re-investment of the purchase-money.]

The events which have happened are these:—Previously to the sale, the validity of which is now in question, the lady had had children, and one of the children had had issue, but all the issue were spent. There was no child or issue of the marriage existing at the time of the sale. The lady was then seventy years of age, and of course it was impossible she should have future children. In that state of circumstances the sale was made under the power, and the

question I have to consider is, whether the power was then a valid power, capable of being exercised under the circumstances I have mentioned.

1856.
 LANTSBERRY
 v.
 COLLIER.
 Judgment.

There can be no doubt that the power was valid in its creation. After the cases of *Powis v. Capron* (a) and *Waring v. Coventry*, before Sir John Leach, besides that of *Biddle v. Perkins* (b) previously decided by Sir L. Shadwell, and several other cases decided subsequently to the same effect, it is plain, whatever doubts may have been suggested by Lord Eldon's remark in *Ware v. Polhill* (c), that a collateral power of sale contained in a settlement by which estates tail are created, is manifestly good in its creation, inasmuch as it is in the power of any of the tenants in tail to destroy by means of a recovery the power so created. So far, therefore, as the original creation of the power is concerned, there is no doubt that it was properly, validly, and effectually created.

In the events which have happened, however, the issue has been spent, and there is a physical impossibility of the lady having future issue; and assuming that I am obliged to consider that to be the case, the limitation will, with regard to the real estate, stand thus—a limitation to the lady for life, the reversion being limited to her father in fee.

With regard to the doubt suggested by *Ware v. Polhill*, Lord St. Leonards has said (d), and it has been repeated since by other authors, that the question supposed to have been decided by Lord Eldon in that case did not, in fact, arise. It is true that Lord Eldon, in holding that the power was void, put it as a ground of his decision that the power might travel through minorities for centuries.

(a) Rolls, May 5th, 1830; 4 Sim. 138, n.; and see 1 My. & K. 252.

(b) 4 Sim. 135.

(c) 11 Ves. 257.

(d) 2 Sugd. Pow. 467—469.

1856.
 LANTSBERRY
 v.
 COLLIER.
 ———
Judgment.

Still, that was by no means a necessary ground for the decision. There leaseholds were settled as well as freeholds and copyholds, and the result of the events which had happened was, that the leaseholds had become absolutely vested in an infant tenant in tail; and the question was, whether, after the estate had thus become absolutely vested, the power could be exercised. I apprehend there can be no doubt whatever, and Lord *St. Leonards* seems to have arrived at that conclusion (a) — that, when what I may call the uses of the settlement, and the purposes of the settlement, are spent, the power is no longer capable of being exercised; and although there may be a technical difficulty with respect to the power being collateral, still the Court will regard the purposes of the settlement as in fact exhausted; and the purposes of the settlement being exhausted, and the power having been created solely for the purposes of the settlement, there is an end to any exercise of the power which could operate in derogation of an absolute interest acquired by any party under the trusts of the settlement.

The observations made by Lord *St. Leonards* on the case of *Ware v. Polhill* are these. He says, "The case was at first treated as an authority that the common power of sale and exchange was void as too remote, if it were not expressly confined to lives in being and twenty-one years afterwards. But it is clear that Lord *Eldon* did not mean to impeach the validity of such powers. Such a power does not, like the power in *Ware v. Polhill*, operate to defeat the estate of the minor tenant in tail, but *transfers* it from one property to another. He is still tenant in tail, whereas in *Ware v. Polhill* the effect of a sale might be to defeat altogether the estate of the representative of a person who died entitled to a vested interest in the absolute property" (a).

(a) 2 Sugd. Pow. 468, &c.

The cases I have referred to before Sir *John Leach*, which were preceded by *Biddle v. Perkins* (a), before Vice-Chancellor Sir *L. Shadwell*, and have been followed by other cases, have clearly decided that where an estate tail is created the power is valid, and the doctrine is now extended a step further by the case of *Boyce v. Hanning* (b). There the limitation was to the use of the husband for life, with remainder to trustees to preserve contingent remainders, with remainder that the wife surviving might receive a rentcharge, with remainder to the children or remoter issue of the marriage as the husband and wife or the survivor should appoint, and in default of appointment to the use of all the children, their heirs and assigns for ever, in equal shares as tenants in common, with executory limitations over to others in case any child died under twenty-one without leaving issue, and if no child, or if all died under twenty-one without leaving issue, then over. It was argued that the power was bad upon the ground that it was not the common case of a limitation in tail, so that the power could be sustained as being a power which could be defeated by a recovery suffered by the tenant in tail, but it was in effect a power unlimited and incapable of being defeated, in consequence of the subsequent limitation being in fee. It being a case from this Court we have only the certificate of the Judges upon the question, and the certificate was as follows:—"This case has been argued before us; we have considered it, and are of opinion that under the said power of sale the Plaintiffs, *Henry Boyce* and *George Mill*, with such consent of the Plaintiffs as required by the said power, can sell and make a valid assurance of the said premises to the said Defendant." The arguments there used in favour of the validity of the power were, first, that the power might be apportioned;—that, at all events, whatever objection there might be to it with re-

1856.
 LANTSLERY
 v.
 COLLIER.
 Judgment.

(a) 4 Sim. 135.

(b) 2 C. & J. 334.

1856.
 LANTSBERY
 v.
 COLLIER.
 —
Judgment.

ference to its indefinite extent, it might be upheld if exercised during the lifetime of the tenant for life; and, secondly, that if it could not be so apportioned, still, being given "to the trustees or trustee for the time being," and not to the parties nominatim, it existed only during the trust; and from the whole provisions of the instrument it might be gathered that the power in the trustees was intended to be confined to the life of the tenant for life and the minority of the children, so as to be within the limits of the rule in question. The latter argument seems to me to concur with the view taken by Lord *St. Leonards* that the Court will look to the whole intent and purpose of the settlement, in order to extend the exercise of the power to the objects of the settlement. Therefore, whether the remainder in fee of the estate to which the power is collateral is limited so as to depend upon estates tail (in which case the power is upheld, as in *Waring v. Coventry*, upon the ground that it can be defeated by any tenant in tail), or whether that remainder in fee or reversion in fee is limited in some other manner, and so as not to depend by way of remainder on an estate tail (in which case whenever that estate in fee vests in possession the whole object and purpose of the settlement is at an end and the power ceases)—in either case the power, although not in terms restrained to lives in being and twenty-one years afterwards, is a valid power, and is not affected by the rule against perpetuities.

The difficulty that pressed most upon my mind was occasioned by an observation of Mr. *Preston* in his book on Abstracts of Title (a). He says, "For these reasons," speaking of powers, "it seems that the common power of sale and exchange in marriage settlements and wills, though not prescribed to be exercised within a given period, is good as to

(a) Vol. 2, p. 158.

the estates for life, because as to them the power falls within the limited period, and also as to estates tail, because the power may be barred by any tenant in tail, and is void as to the remainder or reversion in fee when it falls into possession, *or is discharged from the estate tail*; so that the power will fail when the particular estates, perhaps when the estates tail, shall determine." The suggestion seems to have occurred to his mind, that it might be just possible in adjusting these powers according to the exigencies of the settlement, that where estates tail,—which would have enabled any tenant in tail to defeat the power as well as he could bar any other limitation over,—have been determined, a question might arise, whether, there being nothing left but a life estate and a reversion in fee, the power could still be validly exercised. But when the case is brought to that condition, it falls within what was decided in *Boyce v. Hanning*, where the limitation was to a party for life, with remainder over to the children in fee: and further than that, I adopt the reasoning of Lord *St. Leonards* in considering this very question. He says, after quoting the passage I have read from Mr. *Preston's* work: "The point is not without difficulty. The power, although limited as to time, is, as we have seen, good for the lives of parties living at the date of its creation, and it may be *now* that the power might be held further to exist for twenty-one years from the death of the survivor of the lives. Where the power is to be exercised by or with the consent of a tenant for life, that is of itself a lawful limit—the very power points it out—and so far is good. If the power proceed to authorise the trustees after the death of the tenant for life and during the minority of tenants in tail to sell or exchange, that might be deemed good *pro tanto*, that is, during the twenty-one years from the death of the tenant for life. If the Court should go further, the power might travel through generations. If it might be exercised legally *against* a tenant in tail, although really for his benefit, it would be on the ground that the tenant in tail

1856.
 LANTSBURY
 v.
 COLLIER.
 Judgment.

1856.
 LANTSBERY
 v.
 COLLIER.
 —
Judgment.

might bar the power if he pleased; and although he could not do so during his minority, when, if at all, the power would be exercised against him, yet an executory limitation or shifting use after an estate tail, is open to the same objection, for the event may happen during the minority of the tenant in tail, and before it is in his power to bar the entail, and yet long after the legal limit to such limitations, if they are not preceded by an estate tail. It would be difficult to distinguish the cases." Then he says, "If an exercise of the power after lives in being and twenty-one years were allowed on this ground, it of course could not be avoided as against the remainder or reversion in fee, when that falls into possession: for unless the power continue in force so as to carry *the fee* it cannot be exercised, and if it can, the same ground that gives it validity against the estates tail will support it against the remainder or reversion, so that an execution of the power *previously* to the remainder or reversion in fee falling into possession would be valid. But clearly, after the remainder or reversion in fee had fallen into possession, the power could not be exercised. It is not improbable that the power may be sustained throughout its whole range" (a). He there seems to consider the real test to be, that the moment the Court finds, as in *Ware v. Polhill*, the effect of the settlement spent, and the estate vested absolutely in possession in any party, it will not allow the power of sale to be exercised; but as long as the trusts of the settlement continue, the power is valid for all the purposes of the settlement. Whether the absolute interest—the fee simple of the estate—is limited as in *Waring v. Coventry* after estates tail, or as in *Boyce v. Hanning* after an estate for life, so soon as the fee vests in possession, either by the estates tail being barred or otherwise, the power is determined, and the object of the settlement at an end. Till then, the power continues valid, and may be exercised so as to carry the fee.

(a) 2 Sugd. Pow. 471, 472.

In this case there arises a difficulty from the apparent capriciousness of the character of the settlement. But I must take the intention of the settlor to be well expressed, that so it shall be. The caprice consists in this, that, in the events which have happened, and it being clear that there can be no further issue, the result of the exercise of the power of sale is to change the devolution of the property. By the limitations of the estate the father reserved his reversion in fee after the estate tail should be spent: whereas, in the event of a sale under the power, he directed the proceeds of the sale to be held upon trusts which carry it, in the events which happened, to his daughter absolutely. However, I must look to this, that the settlor, the father, in making provision for his daughter, limits it in this way: he gives the trustees this power. He may have thought it a beneficial power to be exercised by them,—a trust to be reposed in them to be exercised as they might think fit for her benefit, during the continuance of the trusts of the settlement. If they thought fit, his intention was that it should be in their power to transfer the property in the manner I have described, by a sale for his daughter's purposes. It might be beneficial even for her life estate, that the power should be exercised. There is no improper motive imputed to this trustee in the exercise he has so made of this power; and it appears to me, that, the power being valid, I cannot say, on the ground of this apparent capriciousness, that it has not been properly exercised.

The result is, that the power was valid, and has been properly exercised—and I must answer both the questions in the special case in the affirmative.

Decree accordingly.

1856.
LANTSBERRY
v.
COLLIER.
Judgment.

1856.

BEAVAN v. LORD HASTINGS.

Jurisdiction
—*Belgian Re-*
presentative—
Executor de
son tort.

An *English-*
man having
died intestate
in *Belgium*,
possessed of
real and per-
sonal property
there, his bro-
ther went over
from *England*
and obtained
representation
to him pur et
simple, which,
by the *Belgian*
law imposed
upon him a
personal obli-
gation to pay
all the debts
of the intestate
independently
of the amount
of the assets.
The intestate's
brother after-
wards return-
ed to this
country, but
did not take
possession of
any property
in *England* be-
longing to the
intestate: a
creditor of the
intestate ob-
tained letters
of administra-
tion to him in
England:—
Held, that he
could not sue
the intestate's
brother in equity in respect of the personal liability which he had so incurred, but that
his remedy to recover his debt was at law.

THE Plaintiff *Beavan*, in 1845, lent 1040*l.* to *Edward Astley*, since deceased, who was a natural-born subject of this kingdom, but was then residing in *Belgium*, and was in want of money to enable him to furnish a chateau which he had taken at *Eneilles*, in *Belgium*: and for this loan *Edward Astley*, in 1845, gave to the Plaintiff his bond and warrant of attorney, upon which judgment had not been entered up.

Edward Astley made default in payment of the said sum of 1040*l.*, and the whole of such sum, with a large arrear of interest, was still due. *Edward Astley* continued to reside in *Belgium* down to the time of his death, which took place in the year 1846, under circumstances creating great suspicion that he had been murdered, his body having, in April, 1846, been found with marks of violence upon it, in the river *Ourthe*, in *Belgium*. He died a bachelor and intestate, and he left Lady *Astley*, his mother, and the Defendant, Lord *Hastings*, his brother, surviving him, and they were two of his next of kin. *Edward Astley* had, at the time of his death, besides his chateau at *Eneilles*, a small fishing cottage at *Hotton*, on the banks of the river *Ourthe*, and both the chateau and this fishing cottage contained at the time of his death household furniture, and other property and effects, belonging to him, of considerable value. Immediately upon his death, the *Belgian* Juge de Paix of the Canton attended at both of the said residences of the intestate, and caused seals to be placed on his effects and papers there, and caused the chateau and fishing

Held, also, that the intestate's brother, as he had not taken possession of any of the *Eng-*
lish property of the intestate, was not an executor de son tort.

cottage, with their contents, to be properly taken care of for the benefit of the relatives of the intestate entitled to his succession; and information of the death of the intestate was forthwith transmitted by the *Belgian* authorities to Lord *Hastings* and Lady *Astley*.

1856.
BEAVAN
v.
LORD
HASTINGS.
Statement.

Upon receiving such information, Lord *Hastings*, in the same month of April, proceeded to *Eneilles*, accompanied by his solicitor, and took with him a letter of recommendation to the legal authorities there from the *Belgian* Minister of the Interior, and he applied to the several Juges de Paix to remove the seals and give him possession of all the property of his late brother.

According to the law of *Belgium*, which is founded on the Code *Napoleon*, there are two modes of taking succession to the estate of a deceased person. The first is the mode called pur et simple, which makes the party taking the same liable for all the debts of the deceased, whether the value of the estate be sufficient for payment of the debts or not. The other is the mode called sous bénéfice d'inventaire, in which case the person who takes the same only becomes responsible for payment of the debts of the deceased to the extent of the assets received. Lord *Hastings*, on the occasion of his applying to the Juge de Paix of the Canton in which *Eneilles* is situate, declared himself the brother and successor of the said *Edward Astley*, deceased, and demanded the removal of the seals (levée des scellés), and the delivery of the property to him, without description or inventory; and on the 11th of April, 1846, Lord *Hastings* signed the procès verbal containing such demand, which was thereupon duly registered according to the *Belgian* law.

Accordingly, on the 11th of April, 1846, the Juge de Paix and the other legal authorities, at the request of Lord *Hastings*, proceeded with him to the chateau and caused

1856.
 BRAVAN
 v.
 LORD
 HASTINGS.
 Statement.

the seals to be removed without description or inventory, and transferred the possession of all the property, effects, and papers there, which had belonged to the said *Edward Astley* to Lord *Hastings*, who then and there acknowledged the receipt and possession of the same by him; and thereupon a procès verbal of the transaction was, on the same 11th of April, 1846, drawn up and signed by Lord *Hastings* and by the *Belgian* authorities, and duly registered according to the *Belgian* law. Lord *Hastings* then proceeded to the fishing cottage at *Hotton*, accompanied by the Juge de Paix of the canton in which *Hotton* is situate and other *Belgian* authorities, and at his request the same process of removing the seals, and delivering possession to him of the property of the late *Edward Astley* at *Hotton*, without description or inventory, was gone through.

By these means Lord *Hastings* made himself the successor of the intestate, taking such succession pur et simple, and obtained possession of both the said residences at *Eneilles* and *Hotton*, and of the goods, money, furniture, and effects, which were in the same at the death of the intestate. By the mere fact of declaring himself the successor and taking possession of the property of the intestate without inventory as aforesaid, Lord *Hastings*, according to the law of *Belgium*, was deemed to have accepted the succession pur et simple, and to have become personally liable to pay the debts of the said intestate, without reference to the value of the assets; and his taking possession under such circumstances was in the nature of a contract that he would personally pay all the intestate's debts.

In May, 1846, he gave powers of attorney to certain persons in *Belgium*, authorising them to sell all the real and personal property of the intestate there, which had since been done.

The Plaintiff, as a creditor of the intestate, obtained

letters of administration to him in *England*, and filed the bill in this suit against Lord *Hastings* who had returned to this country, praying a declaration that Lord *Hastings* had, by the proceedings in *Belgium*, made himself personally liable to pay the Plaintiff's demand, and that Lord *Hastings* was accountable to the Plaintiff as executor de son tort of *Edward Astley*.

1856.
BEAVAN
v.
LORD
HASTINGS.

Mr. *Cole* (Mr. *Rolt*, Q. C., with him), for the Plaintiff, cited *Preston v. Lord Melville* (a) and *Wilson v. Lady Dunsany* (b).

Argument.

Mr. *Selwyn*, Q. C., and Mr. *Freeling*, for the Defendant, were not called on.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

I think that it is a misconception to suppose that there is, in this case, any remedy in this Court, whatever there may be elsewhere. Assuming that Lord *Hastings* took possession of all the property of the intestate in *Belgium*, in the capacity of his heir pur et simple, so that, according to the law of *Belgium*, he became personally responsible to pay all the debts of the intestate, without regard to the amount of the assets, I looked for some evidence that Lord *Hastings* had possessed himself of any property in *England* belonging to the deceased. It seems that he has not done so. All that he took possession of was property in *Belgium*. Assuming most strongly in favour of the plaintiff's case, that Lord *Hastings* actually accepted all the real and personal property of the deceased in *Belgium*, by constituting an attorney to sell it on his account, and that he thereby became a debtor to every creditor of the intestate, he was not an executor de son tort.

Judgment.

(a) 8 Cl. & F. 12.

(b) 18 Beav. 293.

1856.
 BRAVAN
 v.
 LORD
 HASTINGS.
 Judgment.

He had a right to assert his title as heir, and, according to the Plaintiff's contention, he took this property in such a manner as to subject himself to a certain liability, as though he had entered into a quasi contract to pay every creditor of the intestate; but that engagement does not entitle the plaintiff to sue him in this Court. Lord *Hastings*, it is said, took the property just as it was, and made himself liable to pay the debts, therefore there is no account of assets to be asked against him. How can that be a case for equitable jurisdiction? It is not an engagement which a creditor requires the aid of this Court to enforce, but simply a legal obligation on the part of Lord *Hastings* to pay the debts of the deceased.

It was argued that the Plaintiff is not only a creditor, but also the administrator of the effects of the intestate, and, therefore, cannot sue himself; the bond debt due to him is not gone, but he cannot sue himself in respect of the testator's assets. But this is not a demand against the assets, it is a demand against Lord *Hastings* in respect of a promise to pay made by him under the law of *Belgium*. The Plaintiff's remedy, therefore, must clearly be by an action at law against Lord *Hastings* on the special assumpsit irrespective of any question of assets.

Then it is argued, that by this engagement Lord *Hastings* subjected himself to pay all the debts: and that the Plaintiff holds *English* property as a trustee for all the creditors; and that, in order to relieve that property from a mass of debts, he has a right to call upon Lord *Hastings*, by a suit in equity, to save the estate in *England* harmless, by paying at once all the creditors to whom he has so become liable. But I should require authority to shew that Lord *Hastings* has constituted himself a quasi trustee, for his liability is not in respect of assets at all, but is a mere personal liability.

If the Plaintiff, being administrator in *England*, wishes

to sue Lord *Hastings* at law in respect of a debt due from the intestate to the Plaintiff, he is perfectly at liberty to do so, and the other creditors of the intestate may do the same. Whatever equity might possibly arise from other creditors suing the present Plaintiff and his claiming a right to have the debts paid by Lord *Hastings*, that is not the present case. Lord *Hastings* is not an executor de son tort,—he is sued merely in respect of a personal contract which he has entered into,—and upon none of the points which have been raised can this Court assist the Plaintiff; I must, therefore, dismiss the bill with costs.

1856.
BEAVAN
v.
LORD
HASTINGS.
Judgment.

DOODY v. HIGGINS.

JOHN ADAMS, by his will in 1811, devised and bequeathed all his real and personal estate and effects upon trusts for the benefit of his wife for life, and after her decease for the benefit of her sister *Elizabeth Bennett*, for life, in case she survived his wife (which event happened); and then upon trust to sell and call in his securities to pay legacies: and after specifying certain pecuniary legacies the testator proceeded as follows:—"The residue of my estates I estimate at about 6000*l.*, which be it more or less it is my desire that it be divided equally, share and share alike, amongst the following persons or their heirs for ever: to the grandchildren of my uncle *John Adams*, also to the grandchildren of my uncle *Richard Wheatley*, also to the grandchildren of my uncle *Samuel Wheatley*."

June 28th;
July 12th.

Will—Construction—
"Heir" in a
Bequest of
Personalty—
Next of Kin—
Statutes of
Distribution.

A bequest of personalty to certain persons "or their heirs for ever," the word "heirs" being a word of substitution and not a designation persons:—*Held*, to denote not the nearest of kin in blood, but those who, under the Statutes for the distribution of the personal estates of in-

After the death of *Elizabeth Bennett* in January, 1852, a claim was filed by two of the grandchildren of *Samuel*

testates, would have been entitled to the personal estates of such persons if they had died intestate.

1856.
DOODY
v.
HIGGINS.

Statement.

Wheatley, to have the real estate of the testator sold, and the produce thereof and the testator's personal estate administered.

The hearing of the claim is reported in Mr. *Hare's* Reports (a).

By the decree, dated the 16th of November, 1852, it was declared, that, according to the true construction of the will of the testator, the residue of the produce of his estates and securities for money became, on the death of *Elizabeth Bennett*, divisible into as many shares as the total number of the grandchildren hereinafter described of the testator's uncles, *John Adams*, *Richard Wheatley*, and *Samuel Wheatley*, mentioned in the will, (that is to say), such grandchildren as were living at the time of the testator's death or born afterwards in the lifetime of *Elizabeth Bennett*; and that upon the death of *Elizabeth Bennett* one of the shares in the residuary estate vested absolutely in each of such grandchildren who survived *Elizabeth Bennett*; and that, with regard to each of such grandchildren who died in the lifetime of *Elizabeth Bennett*, one of such shares vested absolutely in the next of kin of such grandchild living at the time of the death of such grandchild, and if more than one of such next of kin, in equal shares and proportions.

In the course of the inquiries it appeared that one of the grandchildren of *Samuel Wheatley*, named *Thomas Croft*, survived the testator, and died in the lifetime of *Elizabeth Bennett* without issue, leaving a widow named *Ann Croft*, since deceased, a sister named *Ann Parry*, then a widow, and two nieces, children of another sister, who, as well as her husband, had died in his lifetime; viz. *Ann*, the wife of the Petitioner *Newton*, and *Mary Bridger*.

(a) Vol. 9, App. p. xxxii.

The Chief Clerk certified that *Ann Parry* was the sole next of kin of *Thomas Croft*, and that she had assigned her share under the will to *Holland* and *Sollom* by way of mortgage.

1856.
Doody
v.
Higgins.
Statement.

By the order on further directions, the residue standing to the credit of the cause was ordered to be divided into twenty-nine equal shares; and it was ordered that one of such shares, in respect of the share payable to the next of kin of *Thomas Croft*, deceased, should be carried over to an account intitled "The account of the next of kin of *Thomas Croft*, deceased," without prejudice to the question whether or not the nearest of kin of such deceased person are entitled in exclusion of any person or persons who would be entitled to share therein if the same were distributed under the Statutes of Distribution.

Newton and his wife now presented a petition, praying that the sum by the order directed to be carried over to the account of the next of kin of *Thomas Croft* might be distributed amongst the petitioner *Newton*, *Mary Bridger*, the legal personal representative of *Ann Croft*, deceased, and *Ann Parry* and her incumbrancers, according to their rights and interests therein.

It was admitted by the counsel on both sides, that the following words contained in the decree—"And if more than one of such next of kin, in equal shares and proportions," were not according to the judgment pronounced by the Court at the hearing of the cause.

Mr. *Hobhouse* for the petitioners:—

Argument.

The Court having determined at the hearing that the

1859.
 Doody
 v.
 Higgins.
 1 Term.

words "or their heirs" must be construed as words of limitation, and the word "heirs" as "heirs according to nature of the property" (a); the parties entitled to this property, which is given as money, are those who under statutes for the distribution of the personal estates of intestates would have been entitled to the personal estate such grandchildren, if they had died intestate.

The principle on which the Court takes personality, bequeathed to one "or his heirs," away from the heir-at-law is that the testator intended the property to devolve by succession: and the persons who would take personality by succession are not the nearest of kin in blood, but the nearest of kin in the ordinary acceptation of that term, i. e., the persons entitled under the Statutes of Distribution: *Low v. Stone* (b), *Gittings v. M'Dermott* (c), *Jacobs v. Jacobs* (d), *Low v. Smith* (e).

In *Elmley v. Young* (f), the testator gave in terms "the next of kin;" here he has given in terms to "heirs."

Mr. Horsey for Holland and Sollom (the assignees of Ann Parry):—

The Court, at the hearing, determined that the "next of kin" were the parties entitled. The words of the judgment are, "the word 'heirs' must be construed according to nature of the property, that is, *next of kin*" (g). Substituting the words "next of kin" for the word "heirs" in the will, and the Court would be compelled to hold that the par-

(a) *Doody v. Higgins*, 9 Hare, App. p. xxxv.

(b) 4 Ves. 649.

(c) 2 My. & K. 69.

(d) 16 Beav. 557.

(e) 2 Jur., N. S., 344.

(f) 2 My. & K. 780.

(g) *Doody v. Higgins*, ubi supra.

entitled are the nearest of kin in blood: *Elmsley v. Young* (a), *Withy v. Mangles* (b); in the latter of which Lord *Cottenham* expressly negatived the contention, that "the term 'next of kin,' used simpliciter, has, by a technical or conventional construction, obtained the meaning of 'those who would be entitled, in case of intestacy, under the Statutes of Distribution,'" and held that it "must be construed in its natural and obvious meaning of 'nearest in proximity of blood.'"

1856.
DOODY
v.
HIGGINS.
Argument.

A contrary construction would let in the widow, who is not of kin at all.

He cited also *Booth v. Vicars* (c), and a decision of Vice-Chancellor *Kindersley* in *Re Walton's Trust* (d), reversed, but upon an independent ground, by the Lords Justices on Appeal (e), in which the husband of a deceased party, named in the will as legatee, had been excluded from taking, under a legacy to her "or her heirs or assigns."

The other parties interested in supporting the contention of the petitioners did not appear.

THE VICE-CHANCELLOR said he had a strong impression in favour of the construction for which the petitioners contended, but, in consequence of the reference at the bar to the decision in *Re Walton's Trust*, he should reserve his judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The question raised by this petition is, whether, under a bequest to the grandchildren of certain persons named,

July 12th.
Judgment.

(a) 2 My. & K. 780.

(b) 10 Cl. & F. 253.

(c) 1 Coll. 6.

(d) Not reported, but more

fully noticed in the judgment on this petition, p. 738.

(e) 14 March, 1856.

1856.
 DOODY
 v.
 HIGGINS.
 Judgment.

followed by the words "or their heirs for ever,"—the Lord Justice *Turner* having already decided, when the cause came before him as Vice-Chancellor, "that the words 'or their heirs' must be construed as words of substitution," and not as amounting to a *designatio personæ*; "and that the word 'heirs' must be construed 'heirs according to the nature of the property,' that is, *next of kin*,"—I am to interpret the term "next of kin" as the "nearest of kin in blood," or as "the persons who under the statutes for the distribution of the estates of intestates would have been entitled to the personal estates of the grandchildren, if they had died intestate," in which case, the widow of a grandchild would be included.

I had very little doubt upon the point when the question was argued. It appeared to me that the only process of reasoning by which the Court had arrived at the conclusion that by the term "heirs" in a bequest of this description, those persons who have been termed "the next of kin" were entitled, was this, that, as in a devise of real estate to one, or, in case of his death, to his heirs, the Court interpreted the word "heirs" as denoting those who, in the event of the devisee's death, would be entitled to succeed to real estate, claiming *ab intestato*; so, in a bequest of personal estate in the like terms, the Court would interpret the word "heirs" as denoting those who would be entitled to succeed to his personal estate, claiming in like manner *ab intestato*.

Some doubt, however, was thrown upon the point by a decision of Vice-Chancellor *Kindersley's*, in *Re Walton's Trust*, which, as stated at the bar, appeared at first to conflict with this view, but which I find to be quite consistent with the current of authorities, as followed by the same learned Judge in the case of *Low v. Smith (a)*.

(a) 2 Jur., N. S., 344.

Of the cases cited as authorities upon the point, the first was that of *Lowndes v. Stone* (a), where, there being a residuary bequest of personalty to "next of kin or heir-at-law," Lord *Loughborough*, C., said, "on one side it is contended that 'next of kin' means 'heir-at-law';' on the other, that 'heir-at-law' means 'next of kin.' It must be distributed according to the statute." That case, however, is open to some difficulty as an authority, in consequence of the different views which have been taken by learned Judges as to its effect: the late Vice-Chancellor of *England* having inferred from it, that "the Chancellor, in effect, declared that the bequest was void" (b); whereas Lord *Cottenham* considered the words "next of kin or heir-at-law" as implying, when taken together, "heirship according to the nature of the property," and therefore as "intimating an intention that the rule of the statute should prevail" (c). Therefore, I must not rely too much upon that case as an authority.

1856.
 {
 DOODY
 v
 HIGGINS.
 —
Judgment.

But in a late case before the Master of the Rolls, that of *Jacobs v. Jacobs* (d), I find an express decision upon the point. There, under a bequest of a residue to be equally divided between certain persons named "or to their heirs," one of such persons having survived the testatrix, and died leaving a widow and children, the present Master of the Rolls held "that the next of kin, according to the statutes," of the deceased person, "at the time of his decease, were entitled, and that they took as tenants in common, and in the proportions fixed by the statute," therefore including the widow.

In *Mounsey v. Blamire* (e), under a bequest in these

(a) 4 Ves. 649.

(b) Per Sir *L. Shadwell*, V. C. E., in *Waite v. Templar*, 2 Sim. 640; and see Lord Commissioner *Bosanquet* in *Elmsley v. Young*, 2 My. & K. 794.

(c) Per Lord *Cottenham*, C., in

Wilhey v. Mangles, 10 Cl. & F. 253; and see 2 My. & K. 794; and Lord *Brougham*, C., in *Gittings v. M'Dermott*, 2 My. & K. 76.

(d) 16 Beav. 557.

(e) 4 Russ. 384.

1856.
 { DOODY
 v.
 HIGGINS.
 —
Judgment.

words:—"to my heir 4000*l.*," it was held, as it was afterwards held in *De Beauvoir v. De Beauvoir* (a), that coheirs were entitled, the word "heirs" being used as a designation personæ. But in the course of his judgment Sir *John Leach*, M. R., says:—"Where the word 'heir' is used to denote succession, there it may be well understood to mean such person or persons as would legally succeed to the property according to its nature and quality," (that in the case of personal property would of course include a widow), "as in *Vaux v. Henderson*, which has been principally relied upon in the argument, and in the familiar case of a gift of personal property to a man and his heirs." He then goes on to say, that where, on the other hand, the word is used, not to denote succession, but to describe a legatee, and there is no context to explain it otherwise, then the Court will not depart from the strict sense of the word "heir:"—a remark which does not apply to the present case, the decision of Lord Justice *Turner* in this case having determined that in the will before me the word "heirs" is not used to describe a legatee, and is not to be taken in its strict sense. The decision in *Mounsey v. Blamire* is inapplicable to the present case; but it is clear from what I have read that Sir *John Leach's* view was, that in a case like the present the parties entitled would be "such persons as would legally succeed to personal property" claiming ab intestato.

So in *Gittings v. M'Dermott* (b), where there was a residuary bequest to each of the testator's sisters *Mary* and *Sarah*, "and upon their deaths respectively to their heirs," *Mary* and *Sarah* having died during the testator's life, Sir *John Leach*, M. R., was of opinion that the residuary gift did not lapse upon their deaths, but that it went "to those who would have taken it by succession had the persons to

(a) 3 H. L. Cas. 524.

(b) 2 My. & K. 69.

whom the life interest was given survived the testator" (a). They again would be the widow and other persons entitled under the Statutes of Distribution. And Lord *Brougham* expressed himself to the like effect in the same case when it came before him on appeal, speaking of "the heir of the personalty" (b) as the person entitled; and again in a subsequent page he adds this—"It may be further observed, that giving to A., and on his death to his heirs, refers to two things which must take place without any such provision,—the death of A., and his heirs taking after him, that is, the property going to those to whom the law gives it; so that it is only saying 'let those take it who may be entitled to take it'" (c).

1856.
Doody
v.
Higgins.
—
Judgment.

And so again in *Withy v. Mangles* (d), Lord *Cottenham*, C., speaks of "heirship according to the nature of the property." He says, "A testator may indeed so express himself as to intimate an intention that the rule of the statute should prevail, as in *Stamp v. Cooke*. So in *Loundes v. Stone*, a gift of the residue of the estate and effects to 'next of kin or heir at law,' was held to include nephews with an uncle, the words implying heirship according to the nature of the property."

What the Court says, therefore, in cases of this kind, is in effect this:—"We cannot give it to the heir at law—therefore we give it to those who would have taken personal estate claiming by succession from the legatee, as ab intestato."

And so in *Low v. Smith* (e), which was a stronger case than the present, because there the word "equally" occurred in the will, whereas, here it occurs only in the decree, and where it is now admitted to have been inserted inadvertently, and not by the direction of the Judge. In *Low v.*

(a) 2 My. & K. 73.

(b) Id. 76.

(c) 2 My. & K. 81.

(d) 10 Cl. & F. 253.

(e) 2 Jur., N. S., 344.

1856.
 { DOODY
 v.
 HIGGINS.
 —
Judgment.

Smith the direction was, "and at his death to be *equally* divided among his legal heirs," and Vice-Chancellor *Kindersley* held, that "heirs" meant next of kin under the statute, and not next of kin simpliciter, notwithstanding the effect of the decree was to give one third to the widow and two thirds to the daughter of the deceased. That, therefore, is an express decision under stronger circumstances than those in the present case.

With regard to the decision of the same learned Judge in *Re Walton's Trust*, I find the facts in that case to have been these: real estate and residuary personal estate were given by will to trustees, upon trust for the testator's wife, and after her decease to be sold, and the proceeds divided equally between the testator's children (nominatim), "or their heirs or assigns." The Vice-Chancellor, reading this as a substitutional gift (the Lords Justices took a different view of it when the case came before them on appeal), decided in favour of the children of a daughter who had died in the interval between the death of the testator and that of the tenant for life, and against her husband, who claimed his wife's share as her administrator. But that decision was upon a point totally distinct from that now under consideration. The husband does not take by succession,—he is not entitled under the Statutes of Distribution, but by virtue of his marital right—a right distinct from and paramount to the Statutes of Distribution (*a*). And under a bequest to a woman, and in the event of her death to her heirs, taking the word 'heirs' as equivalent to 'the persons who under the Statutes of Distribution would be entitled to succeed to her personal property,' her husband would be excluded. I have had an opportunity of consulting the learned Judge by whom *Re Walton's Trust* was decided, and I find that he had no intention whatever of departing from the general current of authorities as I have stated them.

(*a*) See *Milne v. Gilbert*, 2 De G. M'N. & G. 715.

Mr. *Horsey* said, that, had the Court found in this will the words "next of kin" instead of the word "heirs," then according to *Elmsley v. Young* (a), and *Withy v. Mangles* (b), it must have held that none could take but the next of kin in blood. My answer to that argument is, that I do not find the words 'next of kin' in the will. When found in a will they must be construed as he contended. When they are used by the Court, I am at liberty to inquire who are the persons the Court intended to denote by them; and upon the authorities I find the Court must have intended to denote by them, as it does in the common inquiry as to "next of kin" of an intestate, such persons as would have been entitled to succeed to the personal property of the deceased in case he had died intestate, including a widow (c).

1856.
DOODY
v.
HIGGINS.
—
Judgment.

The decision of Lord Justice *Knight Bruce*, when V. C., in *Booth v. Vicars* (d), was upon the express words of that particular will.

It being admitted by the counsel on both sides, that the declaration in the decree, "and if more than one of such next of kin, in equal shares and proportions," was not according to the judgment pronounced by the Court at the hearing of the cause, *Declare*, that the alternative gift to the heirs of the grandchildren named in the will is a gift to the persons who, under the statutes for the distribution of the personal estates of intestates, would have been entitled to the personal estates of such grandchildren if they had died intestate. Give directions for payment to the parties entitled on the principle of the above declaration, &c.

*Minute of
Decree.*
—

(a) 2 My. & K. 780.

(b) 10 Cl. & F. 253.

(c) The Vice-Chancellor referred to a paper in the Law Maga-

zine, Vol. 51, containing a collection of the authorities on this subject.

(d) 1 Coll. 6.

1856.

May 6th;
June 10th.

BENNETT v. MARSHALL.

*Will—Latent
Ambiguity—
Parol Evidence
—Christian
Names.*

Devise "to
*William Mar-
shall*, my se-
cond cousin."
Testator had
no second cou-
sin so named,
but he had
two first cou-
sins once re-
moved, one
named *Wil-
liam Marshall*,
the other
named *Wil-
liam John Ro-
bert Blandford
Marshall*:—
Held, a latent
ambiguity,
and parol evi-
dence admit-
ted to dissolve
it.

JOHN RICHARDS, by his will in 1828, devised (inter alia) as follows: "I give and bequeath my said two estates and two houses," referring to property previously mentioned in his will, "unto my first cousins on my mother's side (*Mary Richards*, born *Marshall*), unto *William Marshall* my second cousin, and unto Mr. *Thomas Bennett* son of *William*, of *Exeter*, to be shared and divided between them my first cousins, second cousin, and *Thomas Bennett*, in equal portions, share and share alike."

It appeared by the Chief Clerk's certificate, that the testator had no second cousin named *William Marshall*, but that he had two first cousins once removed, one named *William Marshall* simpliciter (who was a Defendant), the other named *William John Robert Blandford Marshall*.

The question which of these two was intended by the testator by the above description, was reserved for the opinion of the Court.

Argument.

Mr. *James*, Q. C., and Mr. *Metcalf*, for the Plaintiff.

Mr. *Cairns*, Q. C., and Mr. *C. Barber*, for the Defendant *William Marshall*:—

Ex concessis the words "second cousin" must be taken to mean "first cousin once removed." Substituting the latter for the former, the will runs thus:—"To *William Marshall*, my first cousin once removed," and then the question is at an end, there being a person who precisely

answers the description : *Andrews v. Dobson* (a), *Delmare v. Robello* (b), *Jarman* on Wills, vol. i., pp. 365, 366, citing *Holmes v. Custance* (c), in addition to the above; *Bernasconi v. Atkinson* (d).

1856.
BENNETT
v.
MARSHALL.
Argument.

Mr. C. Hall, in the absence of Mr. Rolt, Q. C., for the heir at law of *William John Robert Blandford Marshall*, who had died intestate :—

Parol evidence is admissible, even upon the authorities cited, for it is not true that there is any one to answer precisely the description in the will, taking that description as it stands. The Defendant has introduced parol evidence to shew that there was no second cousin named *William Marshall*. Having done this, he cannot now be heard to exclude parol evidence to displace the ambiguity he has thus occasioned. “ From the moment that latent ambiguity is produced in the only way in which it can be produced, namely by parol evidence, it must be dissolved in the same way :” Per Lord *Eldon* in *Delmare v. Robello* (e).

Judgment reserved.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

The question in this case is, whether under a devise “ To *William Marshall*, my second cousin,”—the testator having no second cousin so named, but having two first cousins once removed, one named *William Marshall* simpliciter, the other named *William John Robert Blandford Marshall*,—parol evidence is admissible to shew which of these persons was meant by the testator.

June 10th.
Judgment.

I have not been able to find any authority in point ; but

(a) Cox, 425.

(b) 1 Ves. jun. 412.

(c) 12 Ves. 279.

(d) 10 Hare, 345.

(e) 1 Ves. jun. 415.

1856.
 BENNETT
 v.
 MARSHALL.
 Judgment.

I have come to the conclusion that I ought to admit this evidence.

I do not think that the mere circumstance of the testator having no second cousin named *William Marshall*, taken alone, would have been sufficient, in any event, to let in parol evidence. Suppose, for instance, the devise being "to *William Marshall*, my second cousin," the fact had been that the testator had two first cousins once removed, one named *William Marshall*, the other *John Marshall*; in that case the mere circumstance of the testator having no second cousin named *William Marshall*, ought not to let in parol evidence, because *John Marshall* would not answer the description in the will at all.

But here, there is more than the mere circumstance of the testator having no second cousin named *William Marshall*. *William John Robert Blandford Marshall* does answer, in a way, the description in the will. He is capable of being described as *William Marshall*, and the question is, whether there is not a latent ambiguity arising from the circumstance of there being two persons, both capable of being so described.

In *Lord Cheyney's case* (a) I find this laid down: "If a man has two sons, both baptized by the name of *John*, and conceiving that the elder (who had been long absent) is dead, devises his land, by his will in writing, to his son *John* generally, and in truth the elder is living; in this case, the younger may, in pleading or in evidence, allege the devise to him; and if it be denied, he may produce witnesses to prove his father's intent, that he thought the other to be dead; or that he, at the time of the will made, named his son *John*, the younger, and the writer left out the addition of the younger."

Now, in reference to what is laid down in that passage, it is to be observed, that, if a man has two sons, both named

(a) 5 Rep. fol. 68 a.

John, speaking of *John* simpliciter, he would be presumed to mean the elder. As in the common case of a father and son, both having the same Christian name, *John Smith*, for instance, "*John Smith*" simpliciter would be presumed to mean the father. Yet, according to the authority I have cited, parol evidence would be admissible to prove which was meant.

1856.
BENNETT
v.
MARSHALL.
Judgment.

The precise case I have last supposed arose in the case of *Jones v. Newman* (a). There, the Defendant's title arose upon a will which devised the premises to *John Cluer*, of *Calcot*, under whom the Defendant claimed. The Plaintiff gave evidence, that, at the time of making the will, there were two *John Cluers*, father and son, contending therefore that the devise was to the father, who died before the testatrix, and so the devise lapsed: upon this the Defendant offered to prove by parol evidence, that the testatrix intended to leave it to *John Cluer* the son; but the Judge would not suffer it, and a verdict was found for the Plaintiff. "But *per totam Curiam*," says the report, "the Judge was mistaken. The objection arose from parol evidence, and ought to have been encountered by the same."

There is some analogy between that case and the present, in this respect. *John Cluer*, the son, was still *John Cluer*, even during his father's life, though properly to be designated with the addition of "younger:" and so *William John Robert Blandford Marshall* was still *William Marshall*. And if parol evidence was admissible to shew that *John Cluer*, the son, was meant by the testatrix, by the term *John Cluer* simpliciter, there is some analogy (subject, however, to the peculiarity of this case, arising from the additional Christian names) to say that such evidence is admissible here, for a like purpose.

In reference to the peculiarity arising from the party having several Christian names, *Cruise* (b) cites from *Bracton* this

(a) 1 W. Blac. 60.

(b) 4 Dig. 262.

1856.
 BENNETT
 v.
 MARSHALL.
 —
Judgment.

passage :—"Si quis binominis fuerit, sive in nomine proprio, sive in cognomine, illud nomen tenendum erit, quo solet frequentius appellari." And he draws this inference :—"Persons who have several Christian names, as '*Thomas Henry*,' &c., frequently use only the first name ; and, in that case, if they are described in a deed by the first name only, it will be good" (a). My own impression is, that it is the common practice, where a person has several Christian names, to call him by the first.

Then in a will, where—there being two persons, one with several Christian names, the other with one only, that one being identical with the first Christian name of the former,—the testator devises to one of them by that Christian name only, I find no authority for excluding parol evidence, to shew which the testator meant to benefit.

It appears to me, therefore, that I cannot exclude parol evidence in this case (b).

After hearing the evidence and the arguments of counsel on both sides, the Vice-Chancellor said, that although, if the evidence had been perfectly balanced, the Defendant *William Marshall* would have been entitled under the devise, in preference to *William John Robert Blandford Marshall*, yet having regard to the evidence (which he stated) he must hold that the latter was the person meant by the testator.

*Minute of
 Decree.*

DECLARE, that, according to the true construction of the will, the estates in question were devised to (the other persons named in the will nominatim) and to *William John Robert Blandford Marshall*, the first cousin once removed of the testator, it appearing that the testator left no second cousin named "*William Marshall*."

(a) 4 Dig. 261.

(b) Mr. *C. Hall* afterwards mentioned the following authorities,

Lord Camoys v. Blundell, 1 H. L. Ca. 778; 2 Sheppard's Touchstone, 233.

1856.

TUCKER v. LAING.

July 23rd.

THIS was a suit for an injunction to restrain an action by the Defendant *Laing* against the Plaintiff upon his liability as a surety, the Plaintiff claiming to be discharged from such liability under the following circumstances:—

Principal and Surety—Giving Time—Consideration—Alteration of Position.

In 1852, the Defendant *Laing* lent to *Charles Jones* 500*l.*; and the Plaintiff as a surety only, and without any consideration for so doing, joined the said *Jones* and one *Chitty* in a joint and several bond, dated the 1st day of April, 1852, whereby *Jones*, the Plaintiff, and *Chitty* became jointly and severally bound to the Defendant in the penal sum of 1000*l.*, to be paid to the Defendant, his attorney, executors, administrators, or assigns. And by the defeasance or condition of such bond, after reciting, that, by an indenture bearing even date with the said bond, and made between *C. Jones* of the one part, and the Defendant of the other part, in consideration of the advance of the sum of 500*l.* to *Jones* by the Defendant, *Jones* had assigned a policy of assurance upon his own life for the sum of 1000*l.*, under the hands of three of the directors of the Law Life Assurance Society, numbered 11,577, and dated the 10th day of July, 1845, subject to redemption on payment by *Jones*, his executors, administrators, or assigns, to the Defendant, his executors, administrators, or assigns, of the sum of 500*l.*, with interest for the same after the rate of 5*l.* per cent. per annum, on the 1st day of October then

A letter written by the agent of a bond creditor to the principal obligor, giving him eighteen months further time to pay the bond debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future:—*Held* to be a mere promise without consideration, and not binding; and therefore *held* that the co-obligor, who had joined in the bond as surety only, was not thereby discharged.

It is not every alteration of his position by the

act of the creditor that discharges the surety. To have this effect, the alteration must be such as interferes for a time with his remedies against the principal debtor.

Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money:—*Held*, that the surety's liability to the creditor was not discharged.

1856.
 }
 TUCKER
 v.
 LAING.
 —
Statement.

next; and that it was part of the stipulation of such advance of 500*l.* to *Jones* that the repayment thereof, with interest, should be further secured by the joint and several bond of himself, and the Plaintiff and *Chitty*; it was declared, that if *Jones*, the Plaintiff, and *Chitty*, or any of them, their, or any of their heirs, executors, or administrators, should, on the 1st day of October then next ensuing, pay, or cause to be paid, to the Defendant, his executors, administrators, or assigns, the sum of 500*l.*, with interest after the rate of 5*l.* per cent. per annum, to be computed from the date of the said bond, without deduction, being the same sum and interest as were mentioned and intended to be secured by the said therein recited indenture of assignment, then and in such case the said bond should be void.

In June, 1852, *Chitty* died; and about twelve months after his death, the Plaintiff, having heard from his executors that the sum of 500*l.* had not been paid, urged Mr. *Genge*, one of such executors, to request the Defendant to call in his money; but he did not do so.

In December, 1854, *Chislett*, a solicitor's clerk, called on the Plaintiff in London, and stated that he represented the Defendant, when the Plaintiff stated that he was very anxious that the money should be called in, and pressed *Chislett* to apply to *Jones* for it. The Plaintiff, having at the same time been informed by *Chislett* that the policy of assurance had not been kept up, urged upon him the importance of procuring such policy to be renewed; which *Chislett* promised to do.

Considerable correspondence to the same effect afterwards ensued between the Plaintiff and *Chislett*. The policy was renewed, but the interest having fallen into arrear, on the 14th of January, 1856, Mr. *Stephens*, the Defendant's solicitor, wrote to the Plaintiff to insist on his paying the

principal and interest due on the bond. The Plaintiff thereupon endeavoured to raise the necessary money on the security of *Jones* alone, and on the 4th of February, 1856, he agreed with the Unity Insurance Office for a loan of 500*l.* to *Jones* upon certain terms.

1856.
TUCKER
v.
LAING.
Statement.

Meanwhile, however, on the 2nd of February, 1856, *Chislett*, as the agent and on the behalf of the Defendant, as the Plaintiff asserted, wrote the following letter to *Jones* :—

“ Sir,—Agreeably to your request, I have spoken to Mr. *Laing* relative to the paying off of your security, and he is so much annoyed at the trouble which both he and myself have had in obtaining payment of his interest, as well as respecting the policy not having been properly kept up, that he would much rather you would pay off the amount than allow it to remain. I have, however, prevailed on him to consent to let it remain eighteen months longer, if you will be prepared at that time to pay it off; and in the meantime the interest must be regularly paid. I send by this post a copy of this letter to Mr. *Stephens*, and have requested him to see you on the subject. I have also directed him to charge 1*l.* for my expenses in addition to his own; and you will please to pay him the half year's interest due 1st of October last, 12*l.* 10*s.* The premium of the policy becomes due on the 10th of February instant. I hope nothing will prevent this being paid, and you will be good enough to direct Mr. *Whittle* to send me the office receipt.”

Mr. *Stephens* informed the Plaintiff of this; and in consequence of such information the Plaintiff took no further steps in reference to the proposed loan by the Unity Association. Subsequently, *Jones* was seized with a serious illness, which rendered his life uninsurable. The Plaintiff was

1856.
 TUCKER
 v.
 LAING.
 Statement.

again requested to pay off the bond, but he insisted that he was discharged by what had taken place; and an action having been brought against him upon the bond, he filed this bill to restrain it.

Argument.

Mr. Rolt, Q. C., and Mr. Welford, for the Plaintiff, cited *Rees v. Berrington* (a), and argued, that the letter of *Chislett* giving time to the principal debtor had, according to the ordinary rule, released the surety; and that, in this case, there was the additional reason for so holding, that the effect of that letter upon the Plaintiff had been to induce him to desist from a negotiation for a loan to the principal debtor, which would have been applied to discharge the debt, and with it the liability of the surety; and the mode in which it was then intended to effect this object had since become impossible.

Mr. Willcock, Q. C., and Mr. Freeling, for the Defendant, were not called upon.

Judgment.

VICE-CHANCELLOR SIR W. PAGE WOOD :—

Upon the first question, whether this was a binding contract giving time to the principal debtor, I have no doubt whatever. I will afterwards consider the point as to the alteration of position of the surety. The debtor being bound to pay the principal money and interest, all that occurred was, that the Defendant's agent wrote to the debtor the letter of the 2nd of February, 1856. [His Honor read it] Now, first of all, assume—which is taking a view more unfavourable to the Defendant than I should do without fur-

(a) 2 Ves. jun. 540.

ther consideration, if I did not entertain a clear opinion that it could not avail the Plaintiff—that this was an absolute offer to give time for eighteen months, and that it was accepted, the terms being that the debtor was to pay off an arrear of interest, and to pay the interest regularly in future, what consideration was given for it? Nothing is stipulated to be done by the debtor which he was not already bound to do. The letter may indeed well bear a different construction from that which I have assumed. It would be very questionable whether I could hold upon the evidence, that the offer was accepted, unless the arrear of interest actually due, and the expenses, were paid. However, it is not necessary to consider that point, for at most the letter is simply a promise, without consideration, that the creditor will not sue the principal debtor for eighteen months longer, which did not bind the creditor either at law or in equity, and he would have been at liberty to sue the debtor the next day, and there could not have been any relief by way of injunction against such an action.

This point was considered by Lord *Lyndhurst* in *Blake v. White (a)*, in which case he held, that a bond creditor had given time to the debtor by taking six months interest three months before it was due. The suit was for an injunction; and during the argument for the Plaintiff upon a motion for an injunction, Lord *Lyndhurst* asked, “Is there any case where the surety has been discharged upon a mere parol promise to give time? In an action on a bond the Defendant cannot, even if there be a consideration, set up any contract made between the obligee and the principal, unless that contract be under seal. Equity, on the other hand, makes no such distinction if there be a consideration. Is there here sufficient consideration?” And again he said, “Suppose there had been a parol contract to pay a sum of

1856.
TUCKER
v.
LAING.
Judgment.

(a) 1 Y. & C., Exch., 420.

1856.
 TUCKER
 v.
 LAING.
 —
Judgment.

money at a given day, with interest, and the money not being paid on that day, the parties had agreed that the debtor should pay an anticipated interest, if after that the creditor brought his action, would not the new agreement have been a good defence at law? How can a man demand principal for what he has already taken interest?" Afterwards, in giving judgment, he observed, "I do not proceed on the ground that the question as to consideration is immaterial, because I consider that an agreement without consideration is as unworthy of attention in a Court of equity as in a Court of law. But, in equity, all agreements for consideration are equally binding whether under seal or not." And, subsequently, he said, "a mere agreement to give time without any consideration, would not prevent the creditor from successfully prosecuting his action at law."

The question there was, whether time was not given because anticipated interest was paid; but an agreement to pay future interest is only an agreement to do what the party was liable to do before; and there is nothing here to induce a Court of equity to grant an injunction, if an action had been brought upon the bond the next day.

Then it is not necessary to consider the question of agency. The creditor instructed *Stephens* to put the bond in suit; and *Chislett*, without any communication whatever with the Defendant, the bond being in the hands of another party for the purpose of suing upon it, takes upon him to write the letter of the 2nd of February. I doubt if *Chislett* had authority to do this; but I do not think this part of the case material, because it seems to me clear that there was no consideration whatever for the giving of time.

Next, as to the alteration of position: it is not every alteration of position that authorises a surety to come to this Court and claim to be discharged from his liability. There may

be many such alterations which do not vary the rights of the surety as against the principal debtor, and that is the thing to look to. The real test is, has the creditor in any way altered the position of the surety with reference to his remedies against the principal debtor? If not, then this Court does not interfere. For instance, it is well settled that the creditor is under no obligation to press the principal for payment of the debt. No amount of delay on the part of the creditor, in this respect, will release the surety from his liability.

The next point which I have to consider is, suppose that the creditor, knowing that the surety was in treaty, as in this case, with an insurance office to make an arrangement under which the principal debtor was to relieve him from his suretyship, makes a promise of this kind to the principal debtor, and the surety thereupon discontinues his treaty with the insurance office, would the creditor, by such a proceeding, be obliged to lose his remedy against the surety? The answer to this must be—Surely not. I put this case, suppose that instead of writing this letter to the principal debtor, the creditor had said to the surety, I have been pressing the principal debtor for a long time and am now tired of it; I do not choose to persevere, you must pay me, and get the money back as you can. That would alter the position of the surety, but would not entitle him to relief in this Court. In this case, suppose that the creditor had said to the principal debtor, I recommend you not to do anything, I am not going to take any steps against you. That might be very unkind to the surety, but it would not release him from his liability. In fact, nothing short of the creditor's putting himself into such a position as that he could not sue the principal debtor, would be sufficient to discharge the surety from his obligation. The creditor is at liberty to sue the surety at any time, provided he has not interfered with the legal relations between the surety and

1856.
TUCKER
v.
LAING.
Judgm. nt.

1856.

TUCKER

v.

LAING.

Judgment.

the principal debtor, and has not prevented the surety from exercising all or any of his rights against the principal debtor.

One ground on which the Court has relieved the surety is somewhat different, viz. that the proceeding by the creditor against the surety is a breach of his contract with the principal debtor, as in *Boulbee v. Stubbs* (a); for if the creditor, there being an agreement not to sue the principal debtor within a given time, sues the surety within that time, he in consequence throws him upon the principal debtor; and in such a case the Court will interfere for the sake of the principal debtor.

This Court, however, in all cases holds, that if the legal position of the surety is interfered with, and he is prevented, even for a day, from suing the principal debtor, he is altogether discharged from his suretyship. In this case it does not appear that the creditor was for one hour put out of a position to sue the principal debtor. It is not indeed averred that the arrangement which the surety was trying to make went off in consequence of *Chislett's* letter; the Plaintiff only avers that he thought it better not to proceed in the matter, and accordingly he did not do so. However, I hold that the equity for which he contends does not exist, and therefore the manner of averring it is immaterial.

(a) 18 Ves. 20.

1856.

ROOKE v. LORD KENSINGTON.

July 22nd,
23rd, & 24th.

IN 1802, Lord *Kensington*, being owner, first, of the manor of *Earl's Court*, in *Kensington*, and secondly, of certain land and house property in the parish of *Kensington*, part of the demesnes of the manor (which last-mentioned property is hereinafter designated "the *Kensington* estate"), mortgaged the manor, the *Kensington* estate, and other property to Lord *Beauchamp*.

Jurisdiction—
Declaratory
Decree—15 &
16 Vict. c. 86,
s. 50—Rectify-
ing Settlement
—Evidence—
Conveyance—
Manor—Gene-
ral Words.

In 1807, Lord *Beauchamp* released the manor from his mortgage, so that Lord *Kensington* became entitled to it absolutely, free from all charges.

There is no jurisdiction in the Court of Chancery under which a Plaintiff may file a bill, alleging that he has a good legal title to property of which he is in possession without any interruption of his enjoyment, but that the Defendant sets up an equitable claim which ought not to be binding on the Plaintiff.

By deeds dated in November, 1812, the mortgage of the *Kensington* estate was transferred to the *Globe Assurance* Company; and by deeds dated September the 23rd and 24th, 1824, another transfer was made to *Majoribanks* and others, for securing 30,000*l.*; and by deeds dated in 1825 and 1827, the *Kensington* estate was charged with the payment of the further sums of 5000*l.* and 3000*l.* to *Majoribanks* and others.

because he acquired his legal title without notice of it, and (praying no other relief) may obtain in such a suit a declaration that he had not notice of such equitable claim, and that it is not binding upon him.

The 50th section of the 15 & 16 Vict. c. 86, empowers the Court of Chancery "to make binding declarations of right without giving consequential relief" only in cases in which there is some equitable relief which might be granted if the Plaintiff chose to ask for it.

In order to enable the Court of Chancery to rectify a settlement, it must be proved that it was drawn in its existing form by a mistake common to all the parties to it. If the evidence be such as to make it doubtful whether this was so or not, the utmost that the Court will do is to direct a further inquiry.

The lord of the manor of *E.*, which was situated in the parish of *K.*, in the county of *M.*, being entitled also to certain other real estate in *K.*, not parcel of the manor, mortgaged this last-mentioned real estate, not including the manor, to *A.* Afterwards, by a deed reciting that he was seised of or entitled to the messuages, lands, hereditaments, and premises therein-after intended to be conveyed, *subject to the mortgage to A.*, he conveyed to *B.*, by way of mortgage, all the property comprised in the mortgage to *A.*, "and all other the lands, tenements, and hereditaments in the county of *M.*, whereof or whereto the mortgagor is seised or entitled for any estate of inheritance."—*Held*, that the manor of *K.* was not included in this mortgage to *B.*

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.

Statement.

The next transaction was a mortgage by Lord *Kensington* to *Garrard*, and this suit was occasioned by the introduction of certain general words in the deeds by which this mortgage was effected.

An indenture of release dated March 28, 1828, and made between Lord *Kensington* of the one part, and *Garrard* of the other part, contained the following recitals:—

“Whereas the said Lord *Kensington* is seised of or well entitled to the messuages, lands, hereditaments, and premises hereinafter described, or intended to be hereby conveyed, with their appurtenances, in fee simple, subject to a mortgage thereof made by indenture bearing date on or about the 23rd day of September, 1824, for securing to *S. Majoribanks, &c.*, the sum of 30,000*l.* and interest, and also subject to another mortgage thereof for securing to the said mortgagees the further sum of 5000*l.* and interest, and also another mortgage thereof for securing to the said mortgagees the further sum of 3000*l.* and interest; and whereas the said Lord *Kensington* is indebted to the said *S. Garrard* in the sum of 1600*l.*, &c.; and whereas the said Lord *Kensington* hath applied to the said *S. Garrard* to advance, &c., 1200*l.*, which the said *S. Garrard* hath agreed to do, on having the repayment, &c., secured in manner hereinafter expressed; and the said Lord *Kensington* has agreed accordingly to give such security:” Lord *Kensington* then, by the witnessing part, released to *Garrard* the *Kensington* estate, by reference to the deeds of transfer of mortgage of November, 1812, with the following addition: “And all other the hereditaments and premises comprised in the hereinbefore mentioned mortgage of the 23rd day of September, 1824, and all other the lands, tenements, and hereditaments (*if any*) in the county of *Middlesex* aforesaid, whereof or whereto the said Lord *Kensington* is seised or entitled for any estate of inheritance.”

The first question in this cause was, whether the manor

of *Earl's Court*, to which Lord *Kensington* was absolutely entitled as before mentioned, passed by the above words, "all other the lands, &c., if any, in the county of *Middlesex*."

1856.
ROOKE
v.
LORD
KENSINGTON.
Statement.

By deeds dated April 4th and 5th, 1832, Lord *Kensington*, *Majoribanks* and others, *Garrard*, and *Vernon* (a subsequent mortgagee claiming under a deed dated October 27th, 1828), conveyed, by way of transfer of mortgage, to Lord *Braybrooke* and others, the *Kensington* estate by a particular description referring to schedules, with the following addition: "And all other, if any, the hereditaments and premises comprised in and conveyed by the recited indentures of September 23rd and 24th, 1824, and March 28th, 1828, or any of them."

In this state of the title a settlement was made on the marriage of the Honorable *William Edwardes*, the eldest son of Lord *Kensington*, with Miss *Ellison*. This settlement was effected by indentures of lease and release, dated the 9th and 10th days of October, 1833, and made between Lord *Kensington* of the first part, the Honorable *William Edwardes* of the second part, and trustees of the third part. The indenture of release merely recited the agreement for the marriage, the mortgage deeds of April 4th and 5th, 1832, and that Lord *Kensington* had agreed to settle the hereditaments thereafter described; and then Lord *Kensington* conveyed the *Kensington* estate with this addition, "And all other the hereditaments, if any, conveyed by the indentures of April 4th and 5th, 1832," to the use of Lord *Kensington* for life, with remainder to the use of *William Edwardes* for life, with remainder to his first and other sons in tail, &c.

If the manor had not passed by *Garrard's* mortgage, there was no other question in the suit. If it had passed,

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Statement.

two other questions arose, first, whether it passed by the settlement; and, secondly, whether, if it so passed, the settlement ought not to be reformed, on the ground that it was not the intention of the parties to it that it should pass. As to the question of intention, some evidence was adduced, which is noticed by the Vice-Chancellor in his judgment, but is not necessary to state.

In 1837, Lord *Kensington*, assuming to have the manor under the deeds of 1807, and not to have parted with it afterwards, mortgaged the manor to *P. P. Bouverie* and others.

For some time previously to 1842, Lord *Kensington* had entered into a negotiation for the purchase, from Mr. *Mansel*, of a very large house property in *Brompton*, which was copyhold of the manor of *Earl's Court*, which property is hereinafter called "the *Brompton* estate," and in February, 1842, all the terms were arranged.

In order to render Lord *Kensington* capable of taking a conveyance of the *Brompton* estate in fee simple, the deed next stated was prepared.

Lord *Braybrooke* and the other mortgagees under the deed of 1832, and *Whitaker* and *Tatham*, had, at the date of this deed, a charge created by Lord *Kensington* on some fines payable to the lord in respect of the *Brompton* estate.

By a statutory indenture of release dated the 5th day of February, 1842, after reciting the contract with *Mansel*, and that Lord *Kensington* had contracted for a loan with the *London Assurance Society* on the security of the *Brompton* estate, but on the condition that the fee simple should be vested in Lord *Kensington*,—*P. P. Bouverie* and

others, as mortgagees of the manor, and Lord *Braybrooke* and others, and *Whitaker* and *Tatham* in respect of their lien, released the *Brompton* estate to the use of Lord *Kensington* in fee.

1856.
ROOKE
v.
LORD
KENSINGTON.
Statement.

Lord *Braybrooke* and the mortgagees of the deed of 1832, by their answer to the bill, stated that they did not intend by the last-mentioned deed to do more than discharge the *Brompton* estate from the lien on the fines, and did not intend to convey by it the rights, if any, which they had by reason of the manor being vested in them.

By an indenture dated February 8th, 1842, Mr. *Mansel* conveyed the *Brompton* estate to Lord *Kensington*.

By an indenture dated February 9th, 1842, Lord *Kensington* mortgaged the *Brompton* estate to the *London Assurance Society*. This mortgage was transferred to *Meares* and others in August, 1845.

Two terms of 500 years and 1000 years in the manor, which had been assigned in 1802 to a trustee for Lord *Beauchamp*, were at the time of the filing of the bill vested in a trustee for *Meares* and others.

By indentures dated February 9th, 1842, and February 10th, 1842, Lord *Kensington* made second and third mortgages of the *Brompton* estate.

The bill stated the above circumstances, and also stated that a contract had been entered into for the sale of property held under the same title as the *Brompton* estate to the Commissioners of the Exhibition of 1851, and, on the investigation of the title on that occasion, an objection was taken that, either the legal estate of the manor was vested in Lord *Kensington* for life at the time of the conveyance

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Statement.

to him by *Mansel*, in which case the *Brompton* estate would be subject to the trusts of the settlement; or that the freehold of the *Brompton* estate had not been conveyed to Lord *Kensington* by the deed of February, 1842, in which case the *Brompton* estate would still be of copyhold tenure.

The bill was filed by one of the mortgagees of the deed of February 11th, 1842, against the other mortgagees of the *Brompton* estate in 1842, the parties claiming under the settlement of 1833, and Lord *Braybrooke* and the mortgagees of 1832, and other parties, and prayed, 1st, that it might be declared that the *Brompton* estate was not comprised in the settlement of 1833; 2ndly, that, if necessary, the settlement might be reformed, and that it might be declared that the manor was not intended to be comprised in the settlement; 3rdly, that it might be declared that the *London Assurance Society*, at the date and execution of their mortgage, and at the time of the payment of their money, were informed that the manor was not affected by the settlement, and had no notice that it was affected by the settlement, and had a good title to the security at the time of the transfer, and had transferred a good title. The fourth and fifth branches of the prayer had reference to similar declarations as to the transferees of the mortgage of the *London Assurance Society*, and the mortgagees of the deeds of the 10th and 11th of February, 1842. The last part of the prayer asked for a declaration that the transferees of the mortgage of the *London Assurance Society* were entitled to the protection of the terms vested in the trustee.

Argument.

Mr. *Willcock*, Q. C., and Mr. *Shapter* for the plaintiff, cited *Moseley v. Motteux* (a), *Walsh v. Trevannion* (b),

(a) 10 M. & W. 533.

(b) 16 Sim. 178.

Marquis of Exeter v. Marchioness of Exeter (a), *Doe v. Meyrick* (b), and *Jones v. Smith* (c).

1856.
ROOKE
v.
LORD
KENSINGTON.
Argument.

Mr. Rolt, Q. C., and Mr. Chapman for the mortgagees in the same interest as the Plaintiff.

Mr. Selwyn, Q. C., and Mr. Eddis, for parties claiming under the settlement, cited *Jackson v. Turnley* (d).

Mr. James, Q. C., and Mr. Freeling, for Lord Braybrooke.

Mr. Cairns, Q. C., Mr. Bedwell, and Mr. Southgate, for other parties.

VICE-CHANCELLOR SIR W. PAGE WOOD:—

The bill in this case raises so many issues, that it is necessary to consider carefully what are the several grounds of relief on which the case of the Plaintiff rests. The first point is this: the Plaintiff claims to be equitable owner of a certain property, of which the legal estate is outstanding in trustees and others, unless that property be contained in and conveyed by an indenture of settlement made on the marriage of the present Lord *Kensington* with his wife and in contemplation of that marriage. The plaintiff first assumes that the property is comprised in that settlement, and claims that, if so, it was comprised therein by mistake on the part of the several parties to the indenture; and that therefore he is entitled to have a declaration rectifying that mistake, and declaring that the property in question did not pass by the settlement. Then, secondly, he alleges that the words in the settlement are simply words of reference to another mortgage deed, and that the estate

Judgment.

(a) 3 My. & Cr. 321.

(b) 2 C. & J. 223.

(c) 1 Ph. 244.

(d) 1 Drew. 617.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

was not conveyed by the settlement at all; for that, in fact, on looking back to that mortgage deed, it will be found that the estate did not pass by that deed; and therefore the estates comprised in the settlement being only those comprised in that deed, this estate did not pass by the settlement either. And if that be so, the Plaintiff claims to be entitled to a declaration on this ground, that the property did not pass at law. In the first case he claims to have a declaration that it did not pass in equity, but in this case that it did not pass at law. He alleges that there is a doubt and difficulty on the subject; and there being that doubt and difficulty, he claims to be entitled to a declaration, by which that cloud may be removed, and his title may be cleared. Thirdly, he says this—and this is a singular part of the bill—it is immaterial whether the property did or did not pass; because, if it did pass, making the strongest assumption against the Plaintiff, that it was the intent of the parties that it should pass by the settlement, nevertheless the trustee for the Plaintiff, in whom the legal estate was vested, took without any notice of the settlement, or in this sense without notice, with distinct notice that there was a settlement, but with as distinct notice that such settlement did not comprise the property in question. Therefore, according to the case of *Jones v. Smith* (a), it is not to be held that he had notice of the settlement; and the consequence of the parties not having notice of the settlement is, that they are not bound by it, whether it passed the property or not.

This third point I may dispose of at once; for if there be any difficulty on the other part of the case, as to the jurisdiction of this Court to make a declaration in respect of the present interest of the Plaintiff, I apprehend there can be no doubt whatever that there was no jurisdiction before the

(a) 1 Ph. 244.

passing of the Chancery Jurisdiction Act—and as it appears to me there is nothing in that Act—which authorises the Court to say that a party can come as Plaintiff into this Court, and state that he has a good legal title to property, but that some one sets up an equity which ought not to be binding on him because he had no notice of it, not praying any relief at all in respect of that equitable claim, the party making it not being in possession of the property, nor interfering with the Plaintiff's enjoyment of it. In such a case the Plaintiff simply says, I have a title which is in an unsatisfactory state, there are equitable interests outstanding, of which some one may say hereafter I had notice, and I want the Court now, although no claim has been made, to determine whether or not I had notice of these dormant equitable claims. Such a suit as that, if the Court authorised it, would be a simple suit of declarator; and whatever it may be thought hereafter by the Legislature desirable to do to empower this Court to clear titles to property, as yet there is no enactment giving this Court jurisdiction to make such a decree, which would be, in its form, a simple declaration of right. Such a jurisdiction did not exist before the late statute, 15 & 16 Vict. c. 86. If it were necessary to cite authorities for that proposition, the case of *Grove v. Bastard* (a) is a very clear one, in which Lord *Cottenham* says, that there is nothing analogous to the right to a declarator in this country; and it is not conferred by that statute, for the 50th section, which is the only one bearing on the subject, is merely this, that “no suit in the said Court shall be open to objection on the ground that a merely declaratory decree or order is sought thereby; and it shall be lawful for the Court to make binding declarations of right without giving consequential relief.” The form of that section of the statute implies that there is a consequential relief which might be granted in each case

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

(a) 2 Ph. 619.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

when the right has been so declared; but that the parties are not to be compelled to ask for that relief, and they may satisfy themselves by simply asking a declaration of right, and not pursuing the matter further. So Vice-Chancellor *Kindersley* held in the case of *Jackson v. Turnley*(a); and it appears to me that is the clear interpretation of the Act. Therefore, so far as regards that part of the case which depends upon the allegation that the Plaintiff has a legal title, but is embarrassed by the settlement being set up, of which he had no notice, and seeks to have a declaration that he had no notice, and therefore is not bound by it; it is clear that this Court has no jurisdiction to do what is so asked.

[His Honor then recapitulated some of the facts of the case, and continued :] For the purpose of deciding whether the Plaintiff is entitled to have the settlement rectified on the ground of mistake, I must assume that the property in question was comprised in the settlement; and I will consider the case on that assumption first, only saying, that if this property was comprised in the settlement, it must have been on account of the description in the mortgage of 1828 of "all other the lands, tenements, and hereditaments, if any, in the county of *Middlesex* aforesaid, whereof or whereto the said Lord *Kensington*, deceased, is seised or entitled;" and the effect would be, if those words did pass these lands, that they passed the manor of *Earl's Court* and the fee simple interest in what is called in the bill the *Brompton* estate; that is to say, in all the lands held by the *Mansels*. [His Honor continued his summary of the facts.] The Plaintiff has clearly an interest in the case, because, the question being whether or not these very lands are held under the settlement, the copyhold interest having become merged in the freehold interest, he would claim the fee simple absolutely in these particular lands, unless they are comprised in the mortgage; and that gives him a clear in-

(a) 1 Drew. 617.

terest to file this bill, to have the settlement rectified if there be a mistake in it.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

I come then to the question of rectifying the settlement. I assume, for the purpose of this question, that the mortgage of 1828 comprised the property in question. The settlement contains a conveyance of all his messuages and premises described in the settlement, and all other, if any, the hereditaments comprised in and conveyed by the indentures of lease and release of the 4th and 5th of April, 1832, those deeds not being the deeds which actually created the mortgage in question, which were dated in 1828; but they are the same in effect, being the deeds by which the property, whatever it was, which was in *Garrard*, became vested in Lord *Braybrooke* and others. Therefore, if the indenture of 1828 comprised the property in question, then no doubt the settlement here has conveyed the whole of that property to the trustees.

Now, in the argument upon the question, whether this settlement ought to be rectified, several difficulties were raised, one of which was, that there is a want of precision in the pleading on this point. [His Honor noticed the averments in the bill, and continued:] I think I may take this to be a sufficient averment that, as between all the parties to the contract of marriage, this settlement of the whole *Kensington* property,—assuming now that it passed by those indentures of April, 1832, and was therefore included in the settlement,—was an error.

But, on this part of the case, the meagreness of the evidence presents a much greater difficulty than the paucity of averment; because it is quite clear, from the cases of *Walsh v. Trevannion* (a), and *Lord Exeter v. Lady Exeter* (b), that,

(a) 16 Sim. 178.

(b) 3 My. & Cr. 321.

1856.
 ROOKER
 v.
 LORD
 KENSINGTON.
 Judgment.

in order to enable this Court to rectify a settlement, it must be proved that it contains something which has been inserted by mistake, contrary to the intention of all the parties. Where a party has obtained an interest under a deed, especially and above all other considerations, if such party has entered into an irrecoverable condition, such as marriage, upon the faith of that deed, it is not enough to say that the other party who entered into the contract did not intend to part with what the deed purports to convey; but it must be made out that there was a mistake common to all the parties, before he can be liberated from his part of the contract. The other parties have a right to say, we understood the contract to be exactly as it appears by the deed, and we have acted upon the faith of it; and if you come to set it aside, it can only be done by shewing that we were parties to the mistake, and are now improperly insisting on having the benefit of it. In order to make that out, it is remarkable that the only evidence concerning the treaty for the marriage is that of Lord *Kensington's* solicitor, who distinctly says, that he understood in his communication with Lord *Kensington*, that the settlement was to be of something in addition to the *Pembrokeshire* estates, because that additional settlement had been insisted on by the father of the lady, clearly making the father of the lady a party to the treaty, as Lord *Kensington's* solicitor understood it, and as one would suppose to be the case. In consequence of that stipulation, it appears this deed was framed. Now, upon Lord *Kensington's* position, I have not the slightest doubt. Lord *Kensington* had not the least conception that he was conveying anything more than what is called in the bill the *Kensington* estate; that is, all the demesne lands, not including those lands he had purchased of the *Mansels*, and not including the manor of *Earl's Court*. That, I think, is perfectly clear.

[His Honor noticed the evidence on this point.]

The bill being filed, I must look to the answer of the present Lord *Kensington*. He says, in effect, "It is asserted that it was a mistake to include in the settlement the manor of *Earl's Court* and the copyhold interest. At this time, the *Mansels'* interest had not been bought; there was a treaty for it; it was pending, but I always supposed that the manor of *Earl's Court* and all the rest of the demesne lands went, as the expression is, with the *Kensington* estate; and, save as aforesaid, I cannot say anything one way or the other. I have no other belief on the subject, but I had a belief, and I still have that belief, that the whole property went together." That raises the issue sufficiently to say, that it falls on the other party, assuming, as I do here, that the whole property passed by the mortgage and settlement, to shew, that, although it was so included, this particular portion of the property of the manor and the other lands was intended to be excluded.

1856.
 ROOKER
 v.
 LORD
 KENSINGTON.
 Judgment.

[His Honor then noticed the deficiency of the evidence as to intention in this case, and continued:]—

In the case of Lord *Exeter* and Lady *Exeter* (a), the lady's solicitors came forward and very honourably stated, as they were bound to do, that it had never been any part of their contemplation that the property in question was to be settled. That was quite sufficient to decide the case, because there was no doubt on the part of the Court that the father of the husband had no such intention. The paucity of evidence in this case gives it considerable resemblance to the case of *Beaumont v. Bramley* (b), where there was a bill filed to set aside a conveyance after a considerable period of time; and what Lord *Eldon* says is this: "This is a bill filed in February, 1812, to rectify the effect of a

(a) 3 My. & Cr. 321.

(b) T. & R. 41.

1856.
 ROOME
 v.
 LORD
 KENNINGTON.
 Judgment.

conveyance made in 1789, in a case where the question is upon the intention of the parties to the conveyance. Both those parties have been long dead, it is impossible, therefore, to obtain any evidence from either of them; the agent of one of the parties is also dead, so that there is no evidence from him, except what may be collected from papers which were in his possession." Then he makes this remark: "Mr. Pares, the agent of the other party, is living, and is examined on the part of the Defendant; but although allegations are made in the bill with respect to acts done by him, he is not examined in chief, or cross-examined on the part of the Plaintiff." And he says: "In cases of this nature great weight must be given to what is reasonably and properly sworn on the part of a Defendant, because it must be a very strong case that would, even in a recent transaction, operate to overturn or vary a solemn instrument; and after the lapse of so long a time it must be a case that leaves no reasonable doubt—a case that must satisfy the conscience of the Court or of a jury, if it goes to a jury; but it is only after great consideration that such a case should be sent to a jury;" and again, in another part of the judgment, he comments on the Plaintiff's not choosing to call the agent and solicitor of the other party to the conveyance.

It seems to me here that the parties misunderstood their position in relying on the absence of evidence that this property was included, or that anybody believed it was included; because, as I said before, the Defendant has raised the issue as to his belief, and that issue being raised, it was necessary that some party should be called on the subject; and it is singular that the father of the lady, who is alive, should not have been called upon to give evidence.

Observe, again, if the property is really conveyed by those deeds of 1828 and 1832, a very awkward question might arise; and on this part of the case the most that I could

have done for the Plaintiff would have been to have directed an issue, if I could have gone so far, because there might be a question whether he ought not to have proved his case before he came here.

1856.
ROOKE
v.
LORD
KENSINGTON.
Judgment.

[His Honor noticed the evidence as to the treaty for the settlement, and continued :—]

It might possibly be said that the treaty took this shape; the father of the lady was content that such property should be settled as Lord *Kensington* in his judgment considered right and proper. The Plaintiff has not suggested this point for himself, nor produced any evidence which has a satisfactory bearing, as leading up to that issue. In such a state of things, however, the question might arise, if it was left to Lord *Kensington*, what was Lord *Kensington's* intent alone, because all the parties had submitted to be guided by him; and as to his intent, there is no doubt in the case. But the utmost effect of this part of the case would be to make me hesitate whether an issue or a further inquiry should be directed. In the note to that case of *Beaumont v. Dormier* in *supra* see *v. Brown* (c), Sir *William Grant* directed an issue, of the propriety of which Lord *Eldon* expressed no doubt in a proper case, but only suggested a doubt whether the matter was not in that case too plain to require an issue.

But whatever doubt there might be upon this part of the case, whether or not a further inquiry should be directed, the other part of the case renders such a course unnecessary; for I have proceeded thus far on the assumption that these estates did pass by the mortgage deeds and settlement. But I now go back to consider what estates did in fact pass by those deeds, and it seems to me very plain that the Court is

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

justified in holding that at law the estates did not pass by the mortgage deeds.

I am prohibited from sending a case to a Court of law, and therefore I am bound to decide this question either by myself or with the assistance of a Judge of a common law court; and if I thought there was a sufficient degree of doubt on the subject, that would be the course I should have to take in order to arrive at a solution of the preliminary question, whether the estates did or did not pass by these deeds.

Now, looking to the deeds themselves, the mortgage deed stands thus: Lord *Kensington* had two very distinct properties after the transaction of 1807. He had a manor with only manorial rights, with only his rights as lord in the fee simple, subject to the large copyhold interest, and that was conveyed to him and vested in him by Lord *Beauchamp's* re-conveyance in 1807. He makes a mortgage of all the *Kensington* property which he held in hand, and which was built on. He afterwards wishes to make a further mortgage of that property to Mr. *Garrard*, and the intent in the recital is perfectly plain. It is recited that Lord *Kensington* was seised of or entitled to the messuages, lands, hereditaments, and premises thereafter described or intended to be thereby conveyed, with their appurtenances in fee simple: that is to say, everything therefore that was either described or conveyed, one or the other, subject to three mortgages thereof, made by three certain indentures. That is the first recital, and is a plain and distinct recital, that what he intended to convey was that only which was subject to these several mortgages. Then, in the conveyance he conveys all comprised in the mortgage of September, 1824; "and all other the lands, tenements, and hereditaments (if any) in the county of *Middlesex* aforesaid, whereof or whereto the said Lord *Kensington* is seised or entitled for an estate of inheritance."

It is true that the Courts have held,—and the authorities are very numerous on this subject, I will just state their result, they may be found in almost every text-book on conveyancing,—that you cannot control clear words of conveyance by words of recital. That is one canon undoubtedly. But the expression “clear words of conveyance” is subject to interpretation. For instance, the doctrine is as applicable to releases as to anything else, and the exception will be found to be always, that general words are not within that description of clear words of conveyance which cannot be controlled by the recital. The rule, which is extremely well illustrated by a case which I am about to refer to, before Lord *St. Leonards* in *Ireland*, is, that if there is in the deed a clear description of particular property, notwithstanding a contradictory recital, the construction is taken most strongly against the grantor upon his own deed, and there being a doubt whether the recital or the operative part of the conveyance is wrong, the two being clearly contradictory, the operative part, which indicates an intention to convey the greater portion, is to stand, notwithstanding the recital would lead to a contrary conclusion. In releases for instance, upon which this question occurs much more frequently than in conveyances, where there are general words amply sufficient to cover everything, it has been long settled that the recitals clearly restrict the effect of the release; but as an illustration of the rule, if in that case the recitals expressed an intention to release certain things, and the releasing part did not merely release in general terms, but released a particular debt or action not comprised in the recital, I apprehend that could not be limited or controlled by the recital, but that general words may be so controlled. In the case of *Alexander v. Crosbie* (a), the question was, whether there was a sufficiently clear recital that the property which was afterwards

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

(a) L. & G. 145.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

held to pass, was to be excepted? The deed was a marriage settlement, and the recital was, that the settlor intended to settle and convey all his estate except the lands of *Ballyhenry* and its sub-denominations, but in the operative part there was a conveyance by name of a property called *Killahan*, which was a sub-denomination of *Ballyhenry*; and the question was, as the deed clearly expressed an intention to convey all the property except that comprised in the sub-denomination of *Ballyhenry*, and then conveyed a property which was a sub-denomination of *Ballyhenry*, which of the two was to stand; and Lord *St. Leonards* said, "Although I had not the slightest doubt on this question, I thought it right to hear the arguments of all the counsel. As to the authority of a Court of equity to reform the settlement, nobody can dispute its power to correct a mistake." The Court is always tender in varying a settlement where the effect will be to defeat vested rights, or where it is sought to do so on mere parol evidence. In all the cases perhaps in which the Court has reformed a settlement, there has been something beyond the parol evidence, such, for instance, as the instructions for preparing the conveyance, or a note by the attorney, and the mistake properly accounted for; but the Court would, I think, act where the mistake is clearly established by parol evidence. "The evidence goes to establish the fact that *Killahan* was considered a sub-denomination of *Ballyhenry*, and I must take that as a fact established. No attempt has been made to prove the contrary. This, then, leaves the case open to the weight to be given to that fact. The question for me now to decide is, whether, on the face of the settlement of 1815, there is sufficient, with the knowledge of this fact, to enable me to strike that denomination out of the settlement." Then he gives the recital, and continues, "Nothing can be more express, I admit: the manner in which this intention is carried into execution is this; in consideration of the fortune of the lady, and of the said intended marriage, the father and the son do not convey all

the estates by a general description, but take upon themselves to describe the several estates; it is not a general conveyance of all the estates 'save and except *Ballymalis* and *Ballyhenry*,' but a conveyance of the several denominations by name, including *Killahan*. The question then is, Was *Killahan* inserted among the others by mistake?" And this is the part I particularly refer to. "I have here to deal with the case of a conveyance, not by a general description, but where the parties give a description of the exact portions they intend to convey," clearly drawing a distinction between the conveyance by general description, and conveyance of a particular property by a particular name, in which case the recital cannot control the nominal description. "I must sacrifice either the first or the second part of the deed. If there are two parts of a deed inconsistent with each other, I must sacrifice one; but can I have any doubt in sacrificing the general description in the first part, in favour of that in the latter part, in which there is a clear defined and expressed intention?" So that Lord *St. Leonards* considered there that he would have been at liberty, had the conveyance been by general description and general words, to have controlled the operation of those general words by the previous recital; but as there was a clear and express description, he considered that he was not at liberty so to control it by the recital.

Then, the next remark upon the case is: the description in the deed in question is not only a general description, but it is a description of a character which implies much more manifestly than a mere ordinary sweeping general description, that it is intended simply to do what Lord *Mansfield*, in *Moore v. Magrath* (a), considered to have been the function of such a description, namely, to sweep anything ejusdem generis into the mass of property which was

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

(a) Cowp. 9.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

before described by a map and perfect description, for the words are not only "all other the lands, tenements, and hereditaments in the county of *Middlesex*," the case before Lord *Manfield* being, "all other the property in the kingdom of *Ireland*," but the words here are, "all other the lands, tenements, and hereditaments (if any) in the county of *Middlesex*." How can it be supposed that the intent of any of the parties could be, by those words, to include in the deed a manor, with large manorial rights. I have, it is true, no express evidence of their value; but fines were taken of considerable amount. Now, the manor was nothing ejusdem generis with what had been before described, and everybody acquainted with conveyancing knows that manors are usually conveyed by a specific description. Precedence is given to manors; "manors, lands, tenements, and hereditaments," is a common form in which conveyances run, and where, as in this case, the conveyance is of "the messuages, lands, tenements, and hereditaments hereinafter described, and intended to be conveyed subject to a mortgage thereof," and then a description of messuages, lands, tenements, and hereditaments, and then a conveyance of "all other the lands, tenements, and hereditaments (if any) in the county of *Middlesex* aforesaid, whereof or whereto the said Lord *Kensington* is seised or entitled for an estate of inheritance," I think the clear intent and purport there, must be held to be simply to sweep in other property ejusdem generis with the property which had been so conveyed, if there should be any, certainly not to include a demesne property and manorial rights of property of a totally different character from anything attempted to be conveyed or previously described in the deed. I am bound to say, that in *Moore v. Magrath* (a) the decision did not rest on that point only, but it rested on there being no declaration of uses of the lands which it was desired to

(a) Cowp. 9.

include, which made the case very plain, and therefore, I can only treat as a dictum the observations of Lord *Mansfield*. So again in the case of *Walsh v. Trevannion(a)*, the Court had less difficulty in getting rid of the words than exists here, because there was another possible interpretation which might be given to the words, without their being held only to sweep in that which existed ejusdem generis; but it seems to me, on looking to the established doctrine on releases, and notwithstanding the authorities which lay down that words of conveyance cannot be controlled by the operation of the recital, yet, considering the observations of Lord *St. Leonards* as to distinguishing clear words of description from a mere general description, I am bound to hold that none of the manorial property was comprised in the mortgage, and that, therefore, it could not be included in the settlement.

1856.
ROOKE
v.
LORD
KENSINGTON.
Judgment.

Then it has been urged, that I ought, if I take that view, to make a declaration to that effect; and for that purpose the case of *Walsh v. Trevannion(a)* was very much pressed. With regard to clearing away clouds on titles, no doubt there are numerous authorities to shew that where an instrument is void at law, but exists in the shape of a deed, the owner of the property affected by it has a right to have such a deed or instrument destroyed, in order that though the deed is manifestly void at law the cloud which it casts upon the title may be removed. It is somewhat new to me to find that carried a step farther by the argument, that wherever a doubt exists a man may come into this Court for no other purpose than to remove a difficulty occasioned by the construction of an instrument, by having a declaration upon that construction. With regard to the question of intention, the case of *Walsh v. Trevannion(a)* seems to have decided that there was possibly ground for coming for

(a) 16 Sim. 178.

1856.
 ROOKE
 v.
 LORD
 KENSINGTON.
 Judgment.

relief in equity in respect of certain deeds which the trustees were retaining under a pretence of title, to have a direction for them to deliver them up. I should have thought the proper course would be, if the title were legal, to leave the parties to bring their action of trover, in which the whole question might be raised; but I apprehend the decision must have been rested on this, which is probably a sound proposition, but which I am not bound now to consider, namely, that if two parties to an instrument execute it, so as to make it a matter of serious doubt between them upon the construction of the instrument what lands pass by it, there may be possibly an equity to have that made clear which has been left so doubtful by the parties in their conveyance. If, indeed, I had come to a clear conclusion on the evidence as to the intention with regard to including this property in the marriage settlement, it is probable I should have been obliged to follow *Walsh v. Trevannion*(a); but I have come to this conclusion only, namely, that the most I could do would be to put it in a further train of investigation, in order to see whether or not an intention—which does not relate to this mortgage deed, but to the treaty about the settlement of the *Kensington* property, and only by accident to the mortgage deed—to include the manorial property existed or not. But as I have come to the conclusion, on the other point of the case, that the Plaintiff here is not damaged, I ought not to put the parties to the expense of further inquiry and investigation, for no purpose but to make declarations against equitable claims after determining that he has got the legal title, or that it is safely vested in a party in trust for himself.

I do not wish in any way to express any further opinion on *Walsh v. Trevannion* (a), than that it seems to me to have gone farther than any case I know of, in making a de-

(a) 16 Sim. 178.

claration of right; but possibly that may be because it was clearly made out that the two parties had a different intention to that which was expressed in the deed; and that where the intention is clearly made out, it may be right that it should be declared whether its effect be legal or equitable. I think that in this case I am not bound to take any such proceeding, as I have come to the conclusion that the manorial property did not pass by the deeds at law; and therefore the best course I can take for the Plaintiff is simply to express my opinion upon his title. I think that he is entitled to have it stated by way of opinion, not by way of declaration; and I shall decree that, the Court being of opinion that the manor of *Earl's Court* did not, nor did any of the interest of *Lord Kensington* therein, pass by the indentures of the 28th of March, 1828, and the 4th and 5th of April, 1832, or either of them, this bill must be dismissed with costs, against all the parties except those in the same interest with the Plaintiff.

1856.

ROOKB

v.

LORD

KENSINGTON.

Judgment.



INDEX

TO THE

PRINCIPAL MATTERS.

ACCOUNT.

See INFANT.
SOLICITOR.
UNDUE INFLUENCE.

ACCRUER.

See PORTION.

ACKNOWLEDGMENT.

See MARRIED WOMAN, 3.

ACQUIESCENCE.

See INJUNCTION, 5.
MARRIED WOMAN, 2, 3.
PUBLIC COMPANY.
UNDUE INFLUENCE.

ADMINISTRATION.

James E. mortgaged real estate, and died in 1850, intestate, leaving his father *Edward E.* his heir at law and sole next of kin. *Edward E.* died intestate, and without having obtained letters of administration of the personal estate of *James*:—*Held*, that the personal estate of *James* was liable, as between the heir and personal representative of *Edward* and *James*, to be applied in discharge of

the mortgage debt in exoneration of the real estate.

Observations upon the conflict of authorities on the subject of exoneration. *Bond v. England*, 44

See JURISDICTION.

ADVOWSON.

See WILL, 15.

ADVOWSONS APPENDANT.

In 1790, an advowson appendant to a manor was sold and assigned for the residue of a term of 500 years, created in the manor and advowson in 1745, and which, except as to the advowson, ceased:—*Held*, that this did not sever the appendancy; and that the advowson passed by a subsequent release of the manor with general words. *Rooper v. Harrison*, 86

AGENT.

See PRINCIPAL AND AGENT.

AGREEMENT.

An agreement between two solicitors in partnership together, that one of them should continue to carry on the business under their joint

names, and should be entitled to all the profits thereof, and should grant to the other partner an annuity of 300*l.*, during the life of his mother, and, in the event of his dying in the lifetime of his mother, should *pay* to his widow an annuity of 100*l.* during the remainder of his mother's life, and should indemnify him against all liability in respect of his name being used, and that the partnership should cease on the death of the mother of the retiring partner:—*Held* not to be void as against public policy, but to be a valid and binding agreement.

Held, also, that the agreement must be considered to mean, that an annuity was to be granted by deed, and that the retiring partner was entitled to enforce specific performance of such agreement.

Held, further, that, as incidental to such relief, the Court would decree an account and payment of the arrears of the annuity, and would not direct the deed to be ante-dated, so as to cover them, and leave the Plaintiff to recover at law upon the deed.

Seemle, that the Plaintiff ought strictly to have tendered a deed for execution before filing the bill; but, as it was proved that he had made a formal demand for the arrears,—*Held*, that he was entitled to his costs. *Aubin v. Holt*, 66

See INJUNCTION, 3, 4.

MARRIED WOMAN, 3.

SOLICITOR, 1.

SPECIFIC PERFORMANCE, 1, 2.

“ALL THE ESTATE.”

See ATTENDANT TERMS.

ANNUITY.

See AGREEMENT.

LIMITATION OF ACTIONS AND SUITS.

ATTENDANT TERMS.

ANSWER.

See PRACTICE, 3.

ANTICIPATION.

See MARRIED WOMAN, 2.

APPOINTMENT.

Appointment by a father to a son, then in a state of mental and bodily disease, of which he died within a year, set aside—the Court inferring from the evidence as to the father's knowledge of his son's state of health and pecuniary circumstances, as to the circumstances attending the preparation and execution of the appointment, and as to its not having been communicated to the persons to whom it ought to have been communicated, that the appointment was made by the father, not for the benefit of his son, but for his own benefit, and was a fraud upon the power. *The Lady Victoria Long Wellesley v. The Earl of Mornington*, 143

See WILL, 16.

ARBITRATION.

See BENEFIT BUILDING SOCIETY.

ATTENDANT TERMS.

Two terms were created in the same manor, one of 500 years, in 1712, the other of 600 years, in 1768. In 1791 the latter was assigned to *A.*, to secure a mortgage debt; and by a deed of even date, the former was assigned to *B.*, as a trustee for *A.* *A.* died, having appointed *B.*, *C.*, and *D.*, his executors. In 1801, by a deed indorsed on the first assignment of 1791, and “made between *B.*, *C.*, and *D.*, executors of *A.*, of the one part, and *E.* of the other part,” *B.*, *C.*, and *D.* assigned the premises,

"and all the estate," &c. to *E.*, for the residue of the term of 600 years, subject to the equity of redemption:—*Held*, that the term of 1712, being held by *B.* in what must be deemed his own right, did not pass by force of the words "and all the estate, &c., and was not merged. *Rooper v. Harrison*, 86

ATTESTATION.

See WILL, 13.

ATTORNEY-GENERAL.

See WILL, 12.

AWARD.

See BENEFIT BUILDING SOCIETY.

BAILIFF.

*See FARMING STOCK.
INFANT.*

BANKRUPTCY.

1. By the Act 12 & 13 Vict. c. 106, the Legislature did not intend to affect the then future rights of any person who had acquired rights by virtue of any fiat under any Act then in force.

The estate of a bankrupt, on his second bankruptcy in 1846, was not sufficient to pay 15s. in the pound. The assignees allowed him to carry on his trade, and contract debts, for eight years, at the expiration of which a legacy was bequeathed to him. This the assignees claimed, serving the executors, two months after the death of the testatrix, with notice of their claim:—*Held*,

First, that their right, under the 6 Geo. 4, c. 16, s. 127, to the legacy in question, was a right protected by

the saving clause in the 4th section of the 12 & 13 Vict. c. 106; and

Secondly, that they had so conducted themselves that such right could not be taken from them. *In re Anthony Birch's Legacy*, 328

2. A sole trustee, who had appropriated 4000*l.*, part of the trust property, deposited in the box in which he kept the trust deed and the securities for other portions of the trust funds, two policies of assurance, one on his own life for 2000*l.*, the other on the life of his father for 3000*l.*, inclosing them in an envelope with a memorandum, that, "*in the event of his*" (the trustee's) "*death*," the amount of the inclosed policies was to be applied to the repayment of 4000*l.* borrowed by him of the cestui que trust. Six years afterwards the trustee became bankrupt. The policy for 2000*l.* was found by the officer of the Court of Bankruptcy inclosed with the memorandum in the box, the other policy having been paid to the bankrupt upon his father's death:—*Held*, as between the cestui que trust and the assignees in bankruptcy,—

First, that, notwithstanding the words importing contingency, the memorandum was a valid declaration that the policy was, in any event, subject to the trusts of the settlement.

Secondly, that, there being a valid declaration of trust by the sole trustee, he was the proper person to be in possession of the policy, in other words "the true owner" within the meaning of the 12 & 13 Vict. c. 106; and he being also in the reputed possession of the property when the bankruptcy took place, there was no separation of interests, the true owner and the reputed owner were the same person, and the 125th section of the Act did not apply. And an order was made, under the 130th section,

780 BENEFIT BUILDING SOCIETY. CANCELLING DEED.

for an assignment of the policy to the new trustees of the settlement. *In re The Bankrupt Law Consolidation Act, 1849,* 560

See FIXTURES.

LAPSE, 1.

PARTNERSHIP, 2.

PRINCIPAL AND AGENT.

BASTARD.

See LEGITIMATION.

BELGIAN LAW.

See JURISDICTION.

BENEFIT BUILDING SOCIETY.

In any proceedings at law or in equity respecting a Benefit Building Society, the primary consideration for the Court is, that the legislature has provided a cheap and summary mode of settling any question concerning their affairs by arbitration, with the intention carefully to provide that these societies should not be subjected to expensive litigation. The object of these societies is to raise a fund by means of which the members may be enabled to purchase land or houses. The mode by which this is to be done is by investing the subscribed moneys upon very advantageous terms under powers given them by statute.

Where the rules of such a society authorised the directors to invest the funds on mortgages for ten years at any rate of interest, or in building on or improving land mortgaged to them, and authorised members to withdraw their shares upon giving a certain notice, and provided that such members should not be liable to any future fines, but should be entitled to receive the net amount of their subscriptions paid with interest, and also a share

of profits, but no time was specified for making such payments; and the directors had power to pay such claims in the order in which they arose, the amount payable to a withdrawing member having been referred to arbitration:—*Held*, that it was competent to the arbitrator to consider, when, consistently with the due prosecution of the other objects of the society, such payment should be made, and to fix a time for such payment accordingly.

Held, also, that a Court of equity had no jurisdiction to alter the award, unless there was error upon the face of it, or it was shewn to have been corruptly obtained.

Therefore, where a principal sum and interest only were awarded, the Court would not calculate whether the amounts were correct according to the rules, or whether the principal sum included profits or not. The award directed a sum to be paid for costs, which the arbitrator had no power to do, except by a rule made after the member had given notice to withdraw:—*Held*, that this part of the award was bad, but being separable, it did not vitiate the rest. *Armitage v. Walker*, 211

BONA FIDES.

See INJUNCTION, 1, 2.

BOND.

See LIMITATION OF ACTIONS AND SUITS, 1, 3.

MUNICIPAL CORPORATION.

CALLS.

See LIEN.

CANCELLING DEED.

See SURETY, 1.

CONVEYANCE.

CHARITY.

See MORTMAIN, 1, 2.
WILL, 12, 13.

CHILDREN.

See PORTION.
WILL, 15.

CLIENT.

See SOLICITOR, 1, 2.

CODICIL.

See WILL, 13.

CONDITION.

See WILL, 3.

CONFIDENTIAL COMMUNICATIONS.

See PRODUCTION OF DOCUMENTS.

CONSIDERATION.

See MARRIED WOMAN, 3.
SURETY, 2.

CONSTRUCTION.

See MERCHANT SHIPPING ACT, 1854.
SETTLEMENT.
WILL, 4, 6, 7, 8, 9, 10, 11, 15,
17.

CONTRIBUTORY.

See PUBLIC COMPANY.

CONVERSION.

See MORTGAGE, 1.

CONVEYANCE.

See JURISDICTION, 2.

COPYRIGHT. 781

CONVICT.

A pardon granted to a felon under the sign manual has not the effect of a pardon under the Great Seal. The 5 Geo. 4, c. 84, s. 26, protects felons whose sentences have been remitted by the Governor of the penal colony, in the enjoyment of property subsequently acquired by them, not only by their own industry, but also by other means.

So, where a convict who had received a conditional free pardon subsequently became entitled, as one of a class which could not be previously ascertained, to a share of personal property bequeathed by a will made long before the date of his conviction:—*Held*, he was entitled to retain this share against the Crown. *Gough v. Davies*, 623

COPYRIGHT.

The International Copyright Acts and the convention with *France* and Order in Council made thereunder, do not exempt authors of works in *France* claiming copyright in this country from the conditions affecting authors of works in this country.

The Order in Council of the 10th of January, 1852, providing that *French* works must be registered at *Stationers' Hall* within three months after the first publication thereof in *France*, "or, if such work be published in parts, then within three months after the publication of the last part thereof:"—*Held*, that a *French* newspaper published weekly, and not intended to be completed in any definite number of parts, must be registered within three months after its commencement, or, if it had commenced before 1852, within three months after the date of the Order in Council.

Semble, the registration of a num-

ber of such a periodical in 1855, long after its commencement, did not extend to the succeeding numbers the protection of the International Copyright Act.

Neglect to register on the part of the officials at *Stationers' Hall* prevents an author having the benefit of the statute as against the public. *Cassell v. Stiff*, 279

COSTS.

1. Where a person bound by a covenant to renew a lease if required, "at the costs and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease:—*Held*, that the costs of the suit must be paid out of the estate of the covenantor, because it had been rendered necessary by his own act done subsequently to entering into the covenant. *Worham v. Lord Dacre*, 437

2. Trustees of a congregation, which, by the terms of its trust, was to be in connexion with the Established Church of *Scotland*, adopted the opinions of the Free Church of *Scotland*, and refused to retire from the trust. They were ordered to pay the costs of the appointment of new trustees. *Attorney-General v. Murdoch*, 571

See AGREEMENT.

INJUNCTION, 2.

LANDLORD AND TENANT.

MERCHANT SHIPPING ACT, 1854.

PRACTICE, 4.

SECURITY FOR COSTS.

SOLICITOR, 1.

TRUSTEE RELIEF ACT, 1, 2.

WILL, 9, 13.

CREDITORS' DEED.

COST BOOK SYSTEM.

See PUBLIC COMPANY.

COVENANT.

See COSTS, 1.

INJUNCTION, 5.

LANDLORD AND TENANT.

SETTLEMENT.

CRASSA NEGLIGENTIA.

See SOLICITOR, 1.

CREDITORS.

The provision of the 2 & 3 Vict. c. 11, s. 4, that all judgments shall, after the expiration of five years from the entry thereof, be null and void against lands, tenements, and other hereditaments as to creditors, unless re-registered within five years before the right of such creditors accrued, refers only to creditors who have some right or interest in such lands, tenements, or hereditaments, as, for example, by virtue of a creditors' decree, directing a sale of such property.

Creditors of a deceased debtor have not, on his death, a right against his leasehold property, in the hands of his executor or administrator, within the meaning of this Act.—*Quære*, if they have, even after a creditors' decree, any such right in the specific chattels of the deceased debtor, unless the decree directs them to be sold for the benefit of the creditors.

In re Perrin, 2 Dru. & War. 147, distinguished. *Simpson v. Morley*, 71

See LAPSE, 1.

CREDITORS' DEED.

1. A creditor assigned property, by deed, to trustees upon trust to sell,

and apply the clear proceeds in payment of the debts owing by him to such of his creditors as should, before a certain day, execute the deed, and the surplus, if any, to the assignor; and the deed contained a release by the creditors. The assignor and the trustees, who were also creditors, executed the deed at once. No other creditor executed before the stipulated day, but notice of the deed was given to them all, and they forbore to sue, and fifteen years afterwards some were permitted to execute,—the trustees meanwhile having taken possession of and sold part of the property:—*Held*, that the deed was binding on the assignor, and that the creditors were entitled to have the trusts of it carried into effect. *Nicholson v. Tutin*, 18

2. A creditors' deed contained a proviso, that such creditors as should not execute or assent in writing to the deed on or before a certain day, or within such further time, not exceeding thirty days, as the trustees should appoint, should be excluded from the benefit of the deed. The trustees issued an advertisement, which stated their power of extending the time for execution. The debtor owed his son a large sum of money. The son was in America at the date of the deed. A solicitor who had acted for him when in England, on the last day for execution, wrote to the trustees on behalf of the son, signifying his assent to the deed. Subsequently he received from the son a power of attorney to execute the deed; and before the end of the period for which the trustees might have enlarged the time for executing the deed, he applied to them to permit him to execute on behalf of the son:—*Held*, that the son was entitled under these circumstances to the benefit of the deed, because it

was the duty of the trustees to enlarge the time, so as to allow his attorney to execute the deed. *Dunch v. Kent*, 1 Vern. 260, observed upon. *Raworth v. Parker*, 163

CROSS SUIT.

See PRACTICE, 3.

CUSTOM OF LONDON.

See WILL, 9.

CY PRES.

See WILL, 12.

DAMAGES.

See INJUNCTION, 3.

DECLARATORY DECREE.

See JURISDICTION, 2.

DEL CREDERE.

See PRINCIPAL AND AGENT.

DEMONSTRATIVE LEGACY.

See WILL, 13.

DEVASTAVIT.

See LIMITATION OF ACTIONS AND SUITS.

DIRECTORS.

See INJUNCTION, 4.
PLEADING.

DISCLAIMER.

See ELECTION.

DISCRETION.

See POWER OF SALE.

DOMICIL.

See LEGITIMATION.

ELECTION.

Devise of residuary real estate in lieu and discharge of all debts due from testator to devisee. Devisee dies intestate three days after testator:—*Held*, as between the heir and personal representative of the devisee, that, it not being manifestly for the disadvantage of the devisee to retain the devised estate, the Court could not presume a disclaimer by her—consequently her heir was entitled to the estate, and debts claimed by her administrator as due to her from the testator were discharged.

But, *semble*, had it been manifestly for the disadvantage of the devisee to retain the estate upon the terms proposed by the testator, the Court might have presumed a disclaimer. *Harris v. Watkins*, 473

ESTOPPEL.

See MARRIED WOMAN, 3.

EVIDENCE.

See JURISDICTION, 2.

MOTION FOR DECREE.

PRACTICE, 2.

PUBLIC COMPANY.

SOLICITOR, 1.

SPECIFIC PERFORMANCE, 1.

WILL, 12, 18.

EXCEPTIONS.

See PRACTICE, 1, 3.

EXECUTORS.

See PRACTICE, 5

WILL, 3.

EXECUTOR DE SON TORT.

See JURISDICTION.

EXECUTORY BEQUEST.

See LAPSE, 2.

EXONERATION.

See ADMINISTRATION.

FELON.

See CONVICT.

FARMING STOCK.

Farming stock and implements of husbandry are not things *quæ ipso usu consumuntur*, and therefore a gift of them for life does not confer on the legatee for life the absolute interest in them.

A farmer bequeathed farming stock and implements of husbandry and residuary real and personal estate to trustees, upon trust to permit his wife to have the full benefit and enjoyment of the same for life, and then to sell them, and divide the proceeds among his children. The widow, after the testator's death, with the assistance of her son, who was one of the trustees and a legatee in remainder, carried on the testator's farm, and took additional land to farm on lease in the name of her son. On the death of the widow:—*Held*, that the lease of the additional land, and the stock thereon, belonged to her estate, and the stock on the original farm, to the estate of her husband.

Held, that the son was bailiff of the widow; and, on his making a claim to be beneficially entitled to the additional land and the stock thereon, which was not supported by

any evidence proving a gift of it to or a purchase by him, he was made to pay the costs occasioned by such claim; but an inquiry was directed whether any and what sum was proper to be allowed him as bailiff. *Groves v. Wright*, 347

FIXTURES.

Mortgage by two, described in the deed as copper roller manufacturers, reciting a conveyance to them of land, and mills or factories, in a manufacturing town, as tenants in common in fee, and that they were carrying on business at the said mills or factories as copper roller manufacturers, and in such capacity had lately affixed to or placed upon the land, mills, or factories, a steam engine and boilers, together with a large quantity of mill-gear and mill-wright work, and granting the land, mills, or factories, and hereditaments comprised in the recited conveyance, to the use of the Plaintiffs in fee, subject to a proviso for redemption:—*Held*, as between the Plaintiffs and the mortgagor's assignees in bankruptcy,—

First, that, assuming it possible to distinguish between the case of machinery placed upon land for the purpose of trade or manufacture as collateral to and independent of the use and enjoyment of the land, and that of machinery placed upon land for the purpose of better and more profitably enjoying the land (as to which *quære*), the recitals shewed that this was a case of the latter description; and although the means of the proposed use and enjoyment of the land was manufacture or trade, all articles fixed to the freehold, whether by screws, solder, or any other permanent means, or by being let into the soil, partook of the nature of the soil, and would have de-

scended to the heir along with and as part of the soil itself.

Secondly, that the mere grant of the land, following upon the preceding recitals, was sufficient to pass all articles so fixed, and that a subsequent enumeration of certain of such articles did not rebut the inference that all articles so fixed passed by the mere grant of the land, as forming part of the freehold.

And, *semble*, that the same result would have attended an assignment of the land, had the mortgagors been mere termors.

Examination of the authorities upon this subject, and a dictum in *Hellawell v. Eastwood* (6 Exch. 313) observed upon. The principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil.

Thirdly, that the mortgage, although it comprised all fixtures then or thereafter to be placed on the land, and contained a covenant not to remove any of the particulars granted by the mortgage without the permission of the mortgagees, was not an act of bankruptcy, it appearing that the mortgagors had other property, that the mortgage-money was actually advanced, and that the transaction was clear of fraud.

Fourthly, that, the fixtures passing by the grant of the land, the Act for the Registration of Bills of Sale (17 & 18 Vict. c. 37) could have no application.

Fifthly, articles standing merely by their own weight are not "fixtures."

But where part of a machine is a fixture, and another and essential part of it is moveable, the latter also will be held "a fixture." *Mather v. Fraser*, 536

FRAUD.

See APPOINTMENT.

MORTMAIN, 2.

UNDUE INFLUENCE.

FRENCH LAW.

See LEGITIMATION.

GENERAL WORDS.

See ADVOWSONS APPENDANT.

JURISDICTION, 2.

HEIR.

See ADMINISTRATION.

ELECTION.

WILL, 5, 17.

HUSBAND AND WIFE

See LIEN.

MARRIED WOMAN.

SETTLEMENT.

INFANT.

When a father has entered upon the estate of his infant children, the presumption is, that he entered as their guardian and bailiff, and therefore the Statute of Limitations does not begin to run against the children until they attain twenty-one, and from that time at least a child has twenty years within which he may recover possession:—*Semble*, entry by a stranger might not have this effect.

If the father retain possession after the children attain twenty-one, such possession will be considered to be continued in the character in which he entered, so that an account will be directed, not from the filing of the bill, but if necessary from the time of entry.

In an adverse suit, in the nature of an ejectment suit, against a person in no fiduciary relation to the Plaintiff, this account is only directed from

the time of filing the bill. *Thomas v. Thomas*, 79

See SECURITY FOR COSTS.

WILL, 3.

INJUNCTION.

1. Certain music publishers having adapted original words to an old American air, which was re-arranged for them, gave to the song so composed the name of "Minnie," and procured it to be sung by Madame *Anna Thillon*—a popular singer—at *M. Jullien's Concerts in London*; and when it had by that means become a favourite song, they published it with a title page, containing a picture of the singer who had brought the song into notice, and the words "Minnie, sung by Madame *Anna Thillon* and Miss *Dolby* at *Jullien's Concerts*, written by *George Linley*," &c.:—*Held*, that the publishers had by these means obtained a right of property in that name and description of their song which a Court of equity would restrain any person from infringing.

Another music publisher subsequently published the same melody, with different words, and upon the title page they placed a similar portrait of Madame *Anna Thillon*, with the words "*Minnie Dale*, sung at *Jullien's Concerts* (and always encored) by Madame *Anna Thillon*; the Music composed by *H. S. Thompson*," &c., this song having never, in truth, been sung by Madame *Anna Thillon* at *Jullien's Concerts*.

Held, that this was a palpable attempt to induce the public to believe that the song so published was the same as that of the first publishers; and at their suit an injunction was granted on interlocutory application to restrain this or any other similar infringement of their right to the name and description of their song.

Seemle, that such a suit should be instituted without delay after discovering the infringement. *Chappell v. Sheard*, 117

2. The Plaintiffs having published a song, on the title page of which was a portrait of Madame Anna Thillon, and the words "*Minnie*, sung by Madame Anna Thillon and Miss Dolby at Jullien's Concerts, written by George Linley," &c., and this song having become very popular, the Defendant subsequently published another song, consisting of different words to the same air (in which there was no copyright), with a title page on which was a different portrait of Madame Anna Thillon, copied from an American publication, and the words "*Minnie*, dear *Minnie*. Madame Anna Thillon :"—*Held*, that this was an obvious attempt to pass off the Defendant's publication for that of the Plaintiffs, which had obtained the public favour; and this attempt was restrained by an interlocutory injunction without imposing upon the parties the necessity of trying the right at law.

Held also, that the words "Written by George Linley," who was chiefly known as a musical composer, on the title page of the Plaintiffs' song, did not so clearly manifest an intention to mislead the public into the belief that the music was composed by him, as to deprive the Plaintiffs of their right to the injunction.

Nor did the entry at *Stationers' Hall* of the music as well as the words of the song, although the Plaintiffs might have entered only those parts of the publication to which they had an exclusive right.

The Defendant could not escape his liability by cautioning his shopmen to explain to purchasers that his song was not the same as the Plaintiffs', because he could not se-

cure that retail dealers purchasing from him would give the same information to their customers.

An interim injunction having been granted, the Defendant, instead of submitting, insisted on his right to continue the publication of his song :—*Held*, that he must pay the costs of a motion against him to continue the injunction, although it appeared that no application had been made to him by the Plaintiffs previously to the filing of the bill.

Another part of the Plaintiffs' case being, that the Defendant had pirated two bars of music which had been added by the Plaintiffs to the original air, the Court refused to extend the injunction to restrain such piracy until the fact had been established by a trial at law. *Chappell v. Davidson*, 123

3. Where the construction of a contract is clear, and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the Court to interfere by injunction.

And, *seemle*, the Court may so interfere, whether the breach has or has not been actually committed, provided the Defendant claims and insists on a right to do the act which would constitute such breach.

Defendants demised to Plaintiff a plot of land, one-half of an adjoining brook, a cotton mill, reservoir, and steam-engine of 100-horse power on the plot of land, and the use of a weir below the mill, for the purpose of holding up the water of the brook from the weir to the level of the bed of the brook at a bridge above the mill, "and the free use and enjoyment of so much of the stream of water which usually flowed down the brook adjoining the plot of land as should be necessary for effectually

supplying with water and working the said steam-engine, or any other steam-engine of like power and capacity;" and covenanted not to construct any other weir or dam between the weir and bridge, and for quiet enjoyment of the demised premises according to the tenor of the demise. Shortly afterwards the Defendants erected, a little below the bridge but above the Plaintiff's mill, a new cotton mill and steam-engine, with a reservoir, which drew off water from the brook between the Plaintiff's reservoir and the bridge, and they discharged the heated water which they had used for their new mill into the brook, whereby on one occasion they raised the temperature of the water, which the Plaintiff had to use for condensing his engine, from 57° to 68°. All the engineering witnesses agreed that every additional degree of heat above 41° renders water less fit for condensing purposes. It was also deposed that on another occasion, in consequence of the increased temperature, the Plaintiff's engine worked "nearly half a stroke per minute less" than the usual rate of twenty-eight strokes per minute.

Upon motion for a decree, the Court granted a perpetual injunction, restraining the Defendants from discharging heated water, so as to increase the temperature of the water which the Plaintiff used for condensing; being of opinion that the evidence, exclusive of that as to the actual diminution in the working of the engine, shewed a material interference with the quality of the water to which the Plaintiff was entitled under the demise; and that the question whether such interference was such as to give him a right to damages was one which he was not obliged to try.

But so much of the motion as

sought to restrain the Defendants from diverting the water for their new mill, was directed to stand over, upon terms of the Plaintiff bringing an action; the Plaintiff having failed to shew that he had ever yet been deprived by the Defendants of the quantity of water necessary for effectually supplying and working his engine, although it appeared from the evidence that he had great reason to fear that he would be so deprived.
Tipping v. Eckersley, 264

4. Applications to Parliament on public and on private grounds distinguished:—the latter may, in a proper case, be restrained; the former cannot, in any case, be restrained by injunction.

The Defendants (a railway company) agreed with the Plaintiffs (also a railway company) not to apply to Parliament to make any line, or branch line, connecting the Defendants' with the Plaintiffs' railway, except a certain main line and branches and certain deviations, for which application had been made to Parliament by the Defendants. And, in consideration of the premises, the Plaintiffs, who had previously opposed, agreed to support the Defendants' application, and, if required, to petition Parliament in its favour. The Plaintiffs performed their part of the agreement, and the Defendants obtained their Act. The Court refused to restrain the Defendants from applying to Parliament for power to make a further deviation, on the ground that the bill, if passed, would be passed on public grounds, which this Court could not try, and with full knowledge of the agreement; while, if rejected, the inconvenience of opposing the bill would be compensated in damages for a breach of the agreement, assuming that agreement to be legal.

INJUNCTION.

But upon the question, whether such an agreement is legal, the Court expressed no opinion.

An agreement between two railway companies, that the one company will not carry traffic over a particular portion of their line, *held, obiter*, not illegal.

Whether an agreement by the directors of one railway company, that, in return for being entitled to carry traffic over their line on to the line of another railway company, the directors of the first company will, out of the assets of their own company, make certain payments to the latter, is or is not void, as being beyond the powers of the directors—*Quere. The Lancaster and Carlisle Railway Company v. The North Western Railway Company*, 293

5. In a case resting simply upon covenant, if the party seeking specific performance be entitled in possession, he has a right to the enjoyment of the property *modo et forma* according to his covenant; but if he be entitled in remainder only, he must shew that he has sustained some material damage by reason of the breach to entitle him to relief of this nature.

Demise of land for 999 years, at a yearly rent of 33*l.* odd, and covenant by lessee not to carry on, or suffer to be carried on, in any building to be erected on the premises, any of several noxious or objectionable trades and employments, "or any other trade, business, or employment whatsoever," but to use the premises solely for private dwelling-houses. Lessor died, having devised the premises to one for life, and to the Plaintiffs in remainder. Defendant, as sub-lessee, carried on upon the premises a school for girls. A bill for an injunction, living the tenant for life (who was not a Plaintiff), dismissed with costs, upon the

JURISDICTION. 789

ground that, having regard to the circumstance that the Plaintiffs were merely entitled in remainder, the relief prayed was too minute, there being no case of waste, but only a possibility of the respectability of the neighbourhood being in some measure affected; and the argument from acquiescence could not apply, the Plaintiffs having no right of re-entry.

But *held, obiter*, that in a gross case, e. g. a noxious trade, an injunction would have been granted, although the Plaintiffs were not entitled in possession. *Johnstone v. Hall*, 414

See LANDLORD AND TENANT.
PARTNERSHIP, 2.
SURETY, 1, 2.

INQUIRY.

See MARRIED WOMAN, 1.

INSANITY.

See PARTNERSHIP.

INTEREST.

See LIMITATION OF ACTIONS AND SUITS, 3.

JOINT STOCK COMPANY.

See PUBLIC COMPANY.

JUDGMENT.

See CREDITORS.
MUNICIPAL CORPORATION.
PARTNERSHIP, 2.

JURISDICTION.

1. An *Englishman* having died intestate in *Belgium*, possessed of real and personal property there, his brother went over from *England* and obtained representation to him *pur et simple* which by the *Belgian* law im-

posed upon him a personal obligation to pay all the debts of the intestate independently of the amount of the assets. The intestate's brother afterwards returned to this country, but did not take possession of any property in *England* belonging to the intestate: a creditor of the intestate obtained letters of administration to him in *England*:—*Held*, that he could not sue the intestate's brother in equity, in respect of the personal liability which he had so incurred, but that his remedy to recover his debt was at law.

Held, also, that the intestate's brother, as he had not taken possession of any of the *English* property of the intestate, was not an executor de son tort. *Beavan v. Lord Hastings*, 724

2. There is no jurisdiction in the Court of Chancery under which a Plaintiff may file a bill, alleging that he has a good legal title to property of which he is in possession without any interruption of his enjoyment, but that the Defendant sets up an equitable claim which ought not to be binding on the Plaintiff, because he acquired his legal title without notice of it, and (praying no other relief) may obtain, in such a suit, a declaration that he had not notice of such equitable claim, and that it is not binding upon him.

The 50th section of the 15 & 16 Vict. c. 86, empowers the Court of Chancery "to make binding declarations of right without giving consequential relief" only in cases in which there is some equitable relief which might be granted if the Plaintiff chose to ask for it.

In order to enable the Court of Chancery to rectify a settlement, it must be proved that it was drawn in its existing form by a mistake common to all the parties to it. If the evidence be such as to make it doubt-

ful whether this was so or not, the utmost that the Court will do is to direct a further inquiry.

The lord of the manor of *E.*, which was situated in the parish of *K.*, in the county of *M.*, being entitled also to certain other real estate in *K.*, not parcel of the manor, mortgaged this last-mentioned real estate, not including the manor, to *A.* Afterwards, by a deed reciting that he was seised of or entitled to the messuages, lands, hereditaments, and premises therein-after intended to be conveyed, *subject to the mortgage to A.*, he conveyed to *B.* by way of mortgage all the property comprised in the mortgage to *A.*, "and all other the lands, tenements, and hereditaments in the county of *M.*, whereof or whereto" the mortgagor "is seised or entitled for any estate of inheritance."—*Held*, that the manor of *K.* was not included in this mortgage to *B.* *Rooke v. Lord Kensington*, 753

See BENEFIT BUILDING SOCIETY.

INJUNCTION, 4.

SURETY, 1.

LACHES.

See PUBLIC COMPANY.

UNDUE INFLUENCE.

LANDLORD AND TENANT.

A lease was granted of copyhold houses and lands in *London*, for twenty-one years, subject to a small rent, and to the usual covenants to repair, insure, &c., with the usual proviso for re-entry on breach of any of the covenants; and also a covenant by the lessor, *provided the rent should have been paid and the covenants kept*, at the request in writing of the lessee, to procure from the lord of the manor a license to demise the premises for the further term of twenty-one years, *and so from time to time*,

provided such request should be given as aforesaid: and, on obtaining such license, to grant a new lease with the same covenants, including the covenant for renewal. Subsequently, the lease was renewed on the expiration of the term, by a new lease for twenty-one years containing similar covenants. The lessee expended money on the premises, and the value of the property was much increased. The covenants in the renewed lease, to repair and to insure, were broken, and, at the end of the renewed term, the landlord, on account of the breach of the covenants, refused again to renew, and brought an action of ejectment:—*Held*, that a Court of equity would not compel the landlord to renew, nor restrain him from ejecting the lessee.

Held, that the construction of the covenant for renewal in the first lease was not, that in future leases the renewal was to be on request only, whether the lessee's covenants had been performed or not, because it provided that the renewed lease should contain a like covenant for renewal.

As the case was one of great hardship on the lessee, and the question had not before arisen in the case of a lease with a covenant for perpetual renewal, the Court dismissed the bill without costs. *Job v. Banister*, 374

LAPSE.

1. A testator, who had been bankrupt, and had obtained his certificate thirty years before the date of his will, directed by his will that all his debts should be paid, including the debts proved and not paid in full in the bankruptcy, and directed his executors to pay to the official assignee in the bankruptcy, in trust to pay all such creditors, so much money as would make the dividend in the

bankruptcy equal to 20s. in the pound:—*Held*, that the benefit thereby intended to be conferred on a creditor did not lapse by his death in the testator's lifetime. *In re Sowerby's Trust*, 630

2. If there be an executory bequest of personalty depending either upon the determination of a preceding limited interest, or upon a collateral event defeating an interest previously given, and such limited interest determine, or such collateral event happen during the lifetime of the testator, the executory bequest does not lapse.

Accordingly, where there was a bequest to the testator's five daughters of 6000*l.* each, to be invested by the executors within seven years from the testator's death, "in trust for them or their children, *but if any of my said daughters should die leaving no issue, then the share or portion so invested shall be divided amongst those who have issue*, share and share alike, as they arrive at the age of twenty-one years; and if only one, the whole to go to that one only." One daughter died without issue in the lifetime of the testator:—*Held*, that the 6000*l.* given to her passed by the gift over to those of the testator's daughters who were living at his death, and had issue then living, absolutely.

Held, also, that the words above printed in italics ought to be read as though in a parenthesis.

Held, further, that as the estate was sufficient to pay them at the testator's death, interest must be paid upon the legacies from a year after the testator's death, the direction for investment being for the convenience of the estate, and not for the benefit of the residuary legatees. *Varley v. Winn*, 700

See WILL, 1, 16.

LATENT AMBIGUITY.

See WILL, 18.

LEASE.

See COSTS, 1.

INJUNCTION, 5.

LANDLORD AND TENANT.

LEGAL ESTATE.

See MORTGAGE, 1.

LEGITIMATION.

A domiciled *Englishman*, being the putative father of an illegitimate child, born in *France* of a *French* woman, and afterwards becoming domiciled in *France*, cannot, on his subsequent marriage with the mother of the child, legitimatise the child under the provisions of the *French* law, so as to enable it to share in a bequest to his children contained in the will of a person in *England*.

The reasons for this are—

1. That marriage, being a personal contract, is like other personal contracts regulated by the law of the domicile of the party.

2. That the law of the domicile of the putative father attached to the child at its birth, and by that law its bastardy was indelible.

3. That, by the law of *France*, a bastard cannot afterwards be made legitimate, if, at the time of its conception, the parents were incapable of contracting to legitimatise the child after its birth, and a domiciled *Englishman* could not bind himself by such a contract.

4. That, by the law of *France*, a bastard can never be made legitimate if it is uncertain who was the father : and a domiciled *Englishman* by the law of this country cannot, for civil

purposes, be more than the putative father of a bastard child. *In re Wright's Trust*, 595

LIEN.

Where the calls on new shares, allotted to trustees of a marriage settlement, in respect of original railway shares, held by them upon the trusts of the settlement, had been paid out of the wife's separate income:—*Held*, that stock, purchased with the proceeds of the sale of such new shares, was subject to the trusts of the settlement as corpus, and that the wife had a lien for the amount so paid for calls, by analogy to the case of tenant for life advancing money for fines payable on renewal of leaseholds. *Rowley v. Unwin*, 138

LIMITATION OF ACTIONS AND SUITS.

1. *A.* executed a money bond, binding himself and his heirs, and died in 1794, leaving *B.*, his heir and executor, to whom real and personal assets devolved, sufficient to satisfy the bond. *B.* paid interest on the bond during his life. He died in 1813, leaving his widow *C.* his executrix and general legatee and devisee. *C.* paid interest on the bond down to February, 1817. In May following, she married *D.*, who paid the interest and part of the principal due on the bond during the coverture, which was determined in June, 1834, by the death of *C.*, and he afterwards paid the interest down to his own death. *C.* by will, under a power of appointment, gave to *D.* a life interest in her real estate, and he took out administration to her with her will annexed. *D.* died in May, 1852, leaving *E.* his executor. Subsequently, the bond creditor took out administration de bonis non to

A., *B.*, and *C.*, and filed a bill against *E.* and the devisees of *C.*, seeking to obtain payment out of the real and personal estate of *C.*:—*Held*, that the claim of the bond creditor against *C.* personally was a claim on simple contract only as for a devastavit, and was therefore barred by lapse of time. *Thorne v. Kerr*, 54

2. In 1824, *A.*, and *B.* as his surety, covenanted to pay an annuity for ninety-nine years; and *A.* granted lands, to which he was entitled in remainder expectant upon the decease of the survivor of two tenants for life, to a trustee for 500 years, upon trust, in case the annuity should be in arrear for a month, and either before or after the decease of the surviving tenant for life, to sell for the purpose of raising the arrears of the annuity, and securing future payments. *B.* became bankrupt in 1827, *A.* in 1829. The last payment in respect of the annuity was made in 1831. Upon bill filed by the annuitant in 1854, one of the life estates still subsisting:—*Held*, that the Plaintiff was entitled to have the lands sold for the residue of the term according to the trust, and to payment of all arrears.

All that *Hunter v. Nookolds* (1 M'N. & G. 640) determined was, that, in a suit for the administration of the assets of a grantor of an annuity, the annuitant cannot prove, as a personal debt, for more than six years arrears. If the decision went to a case like the present, it is overruled by *Cox v. Dolman* (2 De G., M'N. & G. 592). *Snow v. Booth*,

132

3. A bond debt, by which the heir is bound, is not a debt "charged upon or payable out of" land within sect. 40 of 3 & 4 Will. 4, c. 27; but an action upon it is simply a personal action, and is barred by 3 & 4 Will. 4, c. 42.

Consequently, it is barred by the lapse of twenty years, unless such an acknowledgment, by writing or part payment, has been in the meantime made by the party liable, or his agent, as is required by the 5th section of the latter statute.

This section reserves the right of action against the person making such acknowledgment only, and does not simply rebut the presumption of satisfaction and leave the bond in force, as it would have been under the old law when such presumption was rebutted. Therefore, payment of interest within twenty years by the tenant for life of the obligor's real estate, did not keep alive a right of action on the bond against persons entitled to such real estate in remainder. *Roddam v. Morley*, 336

See INFANT.

LIVING.

See WILL, 15.

MAINTENANCE

See WILL, 9.

MANOR.

See JURISDICTION, 2.

MARRIED WOMAN.

1. If a wife concurs with her husband in mortgaging property over which she has a power, the husband is primarily liable, unless the wife received the money for her separate use, and the Court will direct an inquiry as to this fact. *Thomas v. Thomas*,

79

2. Wife entitled for life to income of settled property for her separate use, without power of anticipation. The trustees allowed the husband to use 1000*l.*, part of the trust funds, for four years. Shortly after which

period, the wife separated from her husband, and then for the first time claimed interest on the 1000*l.* for the four years. She admitted she had allowed her husband to receive her income, so long as he behaved to her as a husband ought to do :—*Held*, that the wife was not entitled to the interest claimed. *Rowley v. Unwin*, 138

3. A devise of real estate to A. for life, remainder to the children of A. in fee, with a provision for survivorship and accruer in case of the death of any or either of such children under the age of twenty-one years and without issue, and if there should not be any child of A., or if any or all such children should die under twenty-one and without issue, a devise to the heirs and assigns of A.; although A. had no child at the date of the will or at the death of the testator—*Held*, that the gift to the heirs of A. was a contingent remainder.

A. was a married woman, and during her coverture she and her husband settled her interest under the will by a deed dated in 1840, and which was acknowledged pursuant to the Fines and Recoveries Act, upon herself for life, remainder to her children, and if none, then to her husband in fee. This deed recited the will accurately. A. died, never having had children :—*Held*, that her heir claiming by descent was not estopped by this deed.

The deed being expressed to be made in consideration of the husband building houses upon the land, which he afterwards finished :—*Held*, that it was a settlement for valuable consideration.

Held—That the Fines and Recoveries Act has not removed the inability of a married woman to contract concerning her real estate; and

therefore *Held*—That the above-mentioned settlement, although for valuable consideration, was not a contract which could be enforced against the heir of the married woman.

The husband and wife afterwards mortgaged the property under a power in the settlement. S., the presumptive heir of the wife, being aware of the Plaintiff's intention to lend money upon such mortgage before he actually did so, told him that the husband was indebted to him S., and that he should expect to have his debt paid off out of the money which the Plaintiff was going to lend, and that he doubted whether the husband could mortgage the property; but S. did not state that he had any interest in the property, or that the husband and wife had not power to make the mortgage :—*Held*, that such knowledge of and acquiescence in the transaction of the mortgage did not create any equity against S. on his afterwards becoming the heir of A., all parties at the time of making the mortgage being in possession of all the facts of the case, and the mistake being a mistake not of fact but of law. *Crofts v. Middleton*, 194

See SECURITY FOR COSTS.
WILL, 14.

MERCHANT SHIPPING ACT, 1854.

The *value* of a ship, within the meaning of the Merchant Shipping Act, 1854, (17 & 18 Vict. c. 104, s. 504), is not the value which the owner would have set upon his ship; nor is the sum for which the owner may have recently insured his ship the only criterion, although it is one of many criteria, of its value: but, under ordinary circumstances, and with the exception of a

case where there is no market for a ship of the kind, such value will be taken to be what the ship would have fetched if sold immediately before her loss.

In the excepted case the Court would ascertain the price given for the ship, and the subsequent deterioration,—*semble*.

Shipowners, being under a contract to replace their ship immediately if lost, insured her for 10,000*l.*; two months after which the ship was lost:—*Held*, that they were not estopped from proving, in a suit instituted by them under the 514th section of the Act, that the value of the ship, at the time when she was lost, did not exceed 5900*l.*

In a suit instituted by a shipowner under the 514th section of the Merchant Shipping Act, 1854, to determine the amount of his liability in respect of the losses there mentioned, to have such amount distributed rateably amongst the several claimants, and to stop actions at law in relation to the same subject-matter, there being no adverse litigation amongst the claimants themselves, nor any other special circumstance occasioning an increase of costs, and over which the Plaintiff has no control, the Plaintiff, as the party eased by the proceedings, pays all the costs of all claimants whose claims are established, including the costs of actions at law commenced by any of such claimants, but stayed by injunction in the suit. *The African Steam Ship Company v. Swanzy and Kennedy*, 660

MERGER.

See ATTENDANT TERMS.

MINES.

See PUBLIC COMPANY.

MISTAKE.

See MARRIED WOMAN, 3.

SOLICITOR, 1.

SPECIFIC PERFORMANCE, 1.

MORTGAGE.

1. First mortgage to *W.*, with power of sale, and declaration of trust of residue of moneys arising from the sale, for the persons entitled to the equity of redemption. Second mortgage to *R.* Third mortgage, without notice of the second, to *H.*, who was *W.*'s solicitor, and as such had possession of the deeds. Afterwards, other incumbrances. Then *W.* died, having devised mortgage and trust estates to *H.*, and appointed him and another executors. *H.* sold under the power, and conveyed the mortgaged estate, paid off *W.*'s mortgage out of the purchase-money, and retained the balance. Subsequently *H.*, for the first time, had notice of *R.*'s mortgage:—*Held*,

First, that *R.*'s omission to give notice did not give priority either to *H.* or to a subsequent incumbrancer, who gave notice before *R.*; the estate, though subsequently converted, being real estate when the securities were executed; and to real estate the rule, as to notice giving priority, does not apply.

Secondly, that, since *R.* was not bound to give notice, his motives for abstaining from giving notice were, in the absence of fraud, immaterial; the rule being, that an equitable incumbrancer on real estate is not postponed by any absence of activity in asserting his rights, except such as amounts to participating in fraud, or to constructive fraud.

Thirdly, that if before the sale *H.* had the legal estate in the premises (and, as to part, *semble*, that he had), still, having since parted with it, his opportunity of using it as a tabula

in naufragio, to protect his own charge, was gone; and that *H.*, having, as devisee of *W.*, paid off *W.*'s mortgage, held the surplus upon trust for the persons entitled to the equity of redemption; and though he might, before notice of *R.*'s mortgage, have paid the surplus to other subsequent incumbrancers, he could not be heard to say, he had appropriated it to himself.

And the incumbrances were declared to have priority according to the dates of the instruments.

Investigation of the doctrine as to the protection afforded to an incumbrancer by means of the legal estate. *Rooper v. Harrison*, 86

2. A mortgagor, having made two successive mortgages of his estate to different persons, purchased the estate from the first mortgagee under a power of sale contained in his mortgage, and subsequently granted further incumbrances to other persons, who had notice of the second mortgage. The purchase-money not being sufficient to pay off the first and second mortgages — *Held*, that the second mortgagee was entitled to a charge upon the estate for the deficiency, and that he might obtain a decree of foreclosure against the mortgagor and the subsequent mortgagees.

Quære, whether this would be the case if the estate had been sold under the power to a stranger, and subsequently purchased from such stranger by the mortgagor. *Otter v. Lord Vaux*, 650

See ADMINISTRATION.

FIXTURES.

MARRIED WOMAN, 1.

NOTICE.

SOLICITOR, 2.

WILL, 10.

MORTMAIN.

1. Bequest of personalty, and de-

vise of lands, to Defendants as joint tenants. Bill to have the bequest and devise declared void, as having been made upon trust for and to the intent that Defendants should carry out certain charitable purposes. Defendants, by their answer, admitted that, since the testator's death, they had been informed and they believed, that, on the occasion of making his will, the testator determined on disposing of a part of his property to persons known to be interested in charitable and religious objects, and knowing one of them personally, and the other by character, he made to them the devise and bequest in the bill mentioned, not by way of or accompanied by any trust, but merely with that degree of confidence which a knowledge of character enables a donor to have as to the probable application or use of a gift; and that, at the testator's request, a letter had been written as a sketch for him to sign, but which was never in fact signed by the testator, expressing his confidence that Defendants would make use of the property in such a way as seemed best fitted to promote the glory of God and the welfare of their fellow sinners, and also expressing that it was the testator's intention to have appropriated the property to charitable purposes. The Defendants denied that they had ever had any communication with the testator about his will, or any of his intentions or wishes, with respect to the disposition of his property; denied that they had ever accepted or recognised, or acted on the letter or its contents; and said, that they had always believed, and insisted, that they were entitled to hold the property free from any trust whatsoever, and to dispose of it in any way they thought proper; but admitted, that they considered it would be proper for them, in a case in which benefits were left them by will under the cir-

cumstances stated, to use those benefits in a manner which would be consistent with the character and profession, in consideration of which they believed they were selected by the testator to receive such benefits:—*Held*, that, the stat. 7 Will. 4 & 1 Vict. c. 26 preventing the Court from looking at the letter in which the testator's intentions were expressed, and it not being shewn that, during the testator's life, there was any bargain or understanding between the testator and the Defendants, or any communication which could be construed into a trust that they would apply the property in such a manner as to carry the testator's intentions into effect, the devise was valid; and the bill was dismissed with costs.
Wallygrave v. Tebbs, 313

2. Testator devised real and personal property to *F.* and the Plaintiffs, their heirs, executors, &c. as tenants in common; and by a memorandum of even date, addressed to them and signed by the testator, but not attested, he expressed his confidence that they would appropriate the property to charitable objects.

On the day of the testator's death the will and the memorandum, which for sixteen months had been kept secret by the testator, were read over to him *in the presence of F.*, by a solicitor, who was in attendance at the testator's request, communicated through *F.*, to take instructions for a codicil. The Plaintiffs remained in ignorance of the existence of the memorandum, and of its contents, until after the testator's death:—*Held*, that, with respect to *F.*, the case was the same as if the testator had himself communicated to him the contents of the memorandum; and that *F.*'s silence when the memorandum was read, was equivalent to an undertaking on his part to carry

the testator's intentions, as therein expressed, into effect; the Court therefore declared, that the one-fourth share given to *F.* was affected by the trusts of the memorandum, so far as they were valid; and that such trusts were invalid as to real estate, and as to personal estate affected with realty.

But *held* also, that the devise, being to *F.* and the Plaintiffs as tenants in common, the Plaintiffs were not affected by the communication of the testator's intentions to *F.*, and were entitled to the remaining three-fourths as tenants in common. *Tee v. Ferris*, 357

MOTION FOR DECREE.

When a cause is heard upon a motion for decree, the Court has power to order the hearing to stand over to prove the execution of a deed.
Raworth v. Parker, 163

MUNICIPAL CORPORATION.

Judgment upon a bond given by a municipal corporation before the passing of the Municipal Corporation Act (5 & 6 Will. 4, c. 76) *Held*, under 1 & 2 Vict. c. 110, s. 13, to operate as a charge upon all lands and hereditaments of the corporation, whether acquired before or after the passing of the Municipal Corporation Act, the Court being of opinion, that, even if the latter statute, standing alone, would have prevented the judgment-creditor from charging after-acquired lands, which, *semble*, it would not, that objection was removed by the 6 & 7 Will. 4, c. 104, s. 1; and that the power by that section given to municipal corporations of charging their lands and hereditaments for securing repayment and satisfaction of any debt contracted by them before the passing of the Municipal Corporation Act, is

a power which they might exercise "for their own benefit," within the meaning of 1 & 2 Vict. c. 110, s. 13, the words "for his own benefit" meaning no more than "for his own use," "not as a trustee."

Observations on *Arnold v. Ridge* (13 C. B. 745). *Arnold v. The Mayor, Aldermen, and Burgesses of the Borough of Gravesend*, 574

NAME.

See INJUNCTION, 1.

NEWSPAPER.

See COPYRIGHT.

NEXT OF KIN.

See ADMINISTRATION.
WILL, 17.

NOTICE.

A subsequent mortgagee of an equitable interest in a share of residuary real estate, without notice of the prior mortgage, does not obtain priority over the former mortgagee, by first giving notice of his security to the trustee in whom the legal estate is vested; notwithstanding that, by a deed of arrangement, made previously to the mortgages, between the mortgagor and the other persons interested in the real estate, their interests were treated as personal estate.

But it is otherwise if the estate is vested in the trustee by a devise to him in trust to sell and to divide the proceeds among several persons, of whom the mortgagor is one, and the mortgages are of the mortgagor's share in such proceeds; because then, although the mortgages may have been made before any sale took place, the subject of them could only, as regarded the mortgagor's interest

PARTNERSHIP.

therein, be considered a chose in action. *Lee v. Howlett*, 531

See MORTGAGE, 1.
PUBLIC COMPANY.

NUISANCE.

See INJUNCTION, 5.

ORDERS.

1850, Nov. 2, ORDERS 16 & 17.
See PRACTICE, 1.
TRUSTEE RELIEF ACT, 1.

ORNAMENTS.

See WILL, 13.

PARDON.

See CONVICT.

PARENT AND CHILD.

See UNDUE INFLUENCE.

PARLIAMENT.

See INJUNCTION, 4.

PARTIES.

See PLEADING.

PARTNERSHIP.

1. Motion for an interim injunction to restrain a partner, who, six months previously, being temporarily of unsound mind, had attempted to commit suicide, from interfering in the partnership affairs, refused, the evidence not shewing, that, at the time of the motion, he was incompetent to conduct the business of the partnership according to the partnership articles. And a motion in a cross suit, to restrain Defendants in such cross suit from preventing the partner who had been insane from trans-

acting the business of the partnership as a partner thereof, granted.

The circumstances, that the conduct and state of mind of the partner in question were such as at once to destroy the confidence of the other partners, and to induce customers to withdraw their custom from the firm, and that the malady under which he laboured might as easily have led him to attempt the life of one of his partners, were held not to furnish sufficient ground for granting the first motion.

Examination of the authorities on this subject. They establish these propositions :—

1st. Actual insanity of a partner is not in itself a dissolution of the partnership, but there must be a decree for dissolution.

2ndly. Such a decree, notwithstanding actual insanity proved to have existed before the filing of the bill, will not be made in a disputed case without a further inquiry, whether, at the time when the relief is sought, the party is in such a state of mind as to be able to conduct the business of the firm in partnership with the other members, according to the articles of partnership.

Seemle, the affirmative of this issue would then lie with the party who had been of unsound mind.

3rdly. Insanity existing when the relief is sought, is good ground for a dissolution. *Anonymous*, 441

2. The power of a solvent partner, upon the bankruptcy of his copartner, to sell the partnership property, is given him in his personal capacity, to enable him to wind up the affairs of the partnership, and cannot be transferred by him to another, either by assignment of "all his share and interest" in the partnership, or by exposing himself, although *bonâ fide*, to a judgment under which all such

share and interest is taken in execution.

Where partnership goods had been taken in execution upon a *bonâ fide* judgment against a solvent partner whose copartner was bankrupt, upon bill filed by the assignee, an injunction was granted to restrain the judgment-creditor, who had purchased all the share, right, and interest of the solvent partner in the goods, and had subsequently professed to sell the whole as her own property, from delivering possession of the goods to the purchaser.

And *held*, that the Plaintiff had not deprived himself of his right to this injunction by his own misconduct, in violently putting the Defendant out of possession.

Observations on the rule that one tenant in common cannot maintain trover against another. *Fraser v. Kershaw*, 496

See AGREEMENT.

PRINCIPAL AND AGENT.

PERPETUITY.

See POWER OF SALE.

WILL, 9.

PETITION.

See TRUSTEE RELIEF ACT.

PLEADING.

Liberty to sue on behalf of oneself and other persons who are too numerous to be brought upon the record, is dependent neither upon the discretion of the Court, nor upon the disposition of such other persons to concur in the suit.

But if such other persons have an interest which might be affected in case the suit were allowed to proceed as on their behalf at the instance of the Plaintiff, or if full justice cannot be done to the Defendants without



having all such persons personally upon the record, the Court will not allow the suit to proceed.

Bill by a single shareholder in an abortive company against the provisional directors, praying the common account. Such directors, being entitled under the deed of settlement to full indemnity out of the deposits in respect of all costs, charges, and expenses incident to the undertaking, had returned to all the shareholders pro rata a part of such deposits:—*Held*, that, since the result of reopening the whole of the accounts as prayed might be to shew that the persons on whose behalf the bill was filed had received more than the amount to which they were entitled, none of such persons could take the account without incurring the liability of refunding to recoup the Defendants; for which purpose the Defendants were entitled to insist on having all such persons substantially upon the record; and on this ground, as well as on the merits, the bill was dismissed. *Williams v. Salmond*, 463

See PRACTICE, 4.
SOLICITOR, 2.

PORTION.

A second son becoming the eldest son in the lifetime of his father, who was tenant for life, with remainder subject to trusts for younger children's portions, in strict settlement, was prevented from taking an interest in the bulk of the estate by reason of a disentailing deed executed by his father and elder brother:—*Held*, that he was entitled to a share of the portions provided for younger children, notwithstanding a proviso for accruer in the event of a younger son becoming an eldest son, the Court being of opinion, that, in being excluded by the disentailing deed, he was in effect excluded by the settle-

POWER OF SALE.

ment of which the disentailing deed was necessarily an incident, and the intention was clear to exclude none from the portions who were excluded by the settlement from taking the bulk of the estate.

Peacocke v. Pares (2 Keen, 689), observed upon. It is in conflict with *Spencer v. Spencer* (8 Sim. 87), and not to be followed as an authority. *Macoubrey v. Jones*, 684

POWER.

See APPOINTMENT.

MORTGAGE.

WILL, 2, 14, 16.

POWER OF SALE.

A father, on the marriage of his daughter in 1806, settled real estate upon trusts for the separate use of his daughter for life, with remainder in case she survived her husband (which event happened) to her children, as tenants in common in tail, and limited the reversion to himself in fee. The settlement contained a collateral power of sale not in terms restricted as to time. In 1850, the daughter's issue being spent, and the daughter being a widow and more than seventy years of age, the trustee executed a deed purporting to be made in exercise of the power, and to be a conveyance of the fee simple:—*Held*,

1st. That the power was valid and subsisting at the date of the deed of 1850.

2ndly. That it was well exercised by that deed, although, under the trusts of the settlement, the effect of its exercise was to change the devolution of the property, passing it in the events which had happened to the daughter absolutely.

Observations on *Ware v. Polhill* (11 Ves. 257), and review of the authorities respecting collateral powers

of sale not in terms restricted as to time. The Court looks to the whole intent and purpose of the settlement, and, whether the reversion or remainder in fee simple be limited after estates tail or after estates for life, will hold the power to be a valid and subsisting power until the estates tail (if any) are barred, or the fee simple vested in possession. In either of which events the purpose of the settlement is spent, and the power ceases. *Lantsbery v. Collier*, 709

PRACTICE.

1. When the original exceptions for insufficiency are again set down, after a further answer has been put in, which may be done at once, under the 16th and 17th Orders of Nov. 2nd, 1850, Defendants submitting to such exceptions should not apply at Chambers for further time, as the Plaintiff, by agreeing to an order so made, might possibly waive his exceptions altogether.

The proper course in such a case is to notify the Defendants' submission to the Plaintiff, and to agree upon some further time being allowed, and to submit this point only to the Court when the exceptions are called on. *The Manchester, Sheffield, and Lincolnshire Railway Company v. Workson Board of Health*, 25

2. A party to a cause, filing or giving notice to read an affidavit before the evidence is closed, may be cross-examined upon such affidavit at once, without waiting until the evidence is closed.

A party having filed or given notice to read an affidavit is not at liberty to withdraw it. *Clarke v. Law*, 28

3. Where the Plaintiff in the original suit had obtained the usual order, giving him time to answer a

cross bill, after the Plaintiff in the cross suit should have put in a "full and sufficient answer" to the original bill:—*Held*, that, for the purpose of computing the time so given, the answer must be considered sufficient from the time of its being put in, unless proved insufficient upon exceptions. *Lafone v. The Falkland Islands Company*, 276

4. The Court has no jurisdiction to order the costs of all parties to a special case to be paid unless there is a fund in Court. The proper course is to insert in the special case a question out of what estate or fund the costs should be paid. *Blinston v. Warburton*, 400

5. On an application being made to stay a creditors' suit because of a decree obtained in an administration suit subsequently instituted by two of the executors against the third, as there was no evidence of the amount of assets received by the executors, and as it appeared that the creditors' case in the first suit depended on vouchers and documents in the hands of the executors, the Court ordered the motion to stand over until the executors had put in their answer in that suit.

Semble, that a creditor whose suit in equity is stayed, as well as a creditor who is restrained from prosecuting an action at law, is entitled to have a discovery of assets possessed by the executors, and payment of the amount into Court. *Macrae v. Smith, Panton v. Smith*, 411

See COSTS.

MOTION FOR DECREE.

SECURITY FOR COSTS.

TRUSTEE RELIEF ACT, 1, 2.

WILL, 12.

PRESUMPTION.

See ELECTION.

PRINCIPAL AND AGENT.

Semble, a contract for a *del credere* agency is not a promise to answer for the debt of another within the 4th section of the Statute of Frauds, on the authority of *Couturier v. Hastie* (8 Exch. 40); and observations on that case.

The firm of *J. F. & Sons*, as agents of the Plaintiffs, supplied goods to the firm of *S. & W.* upon the footing of the latter becoming debtors to the Plaintiffs. They also supplied the same firm with other goods on their own behalf. They made no distinction in their accounts between the goods supplied by them as agents of the Plaintiffs, and those which they supplied on their own behalf. *E. F.* was a partner in both firms:—*Held*, that communications made by the firm of *J. F. & Sons* to the Plaintiffs, admitting a large debt to be due from the firm of *S. & W.*, and undertaking that *E. F.* would use his influence as a partner with *S. & W.* to secure its reduction, upon the faith of which communication the Plaintiffs forbore to sue *S. & W.*, precluded that firm from treating their debt to the Plaintiffs as one which had been liquidated by the appropriation of the payments made by them to the firm of *J. F. & Sons* in order of date.

Held also, that, under a deed of inspection, by which it was agreed that the several estates of the two firms should be administered upon the principles and according to the rules and practice of the bankrupt law, and as if acts of bankruptcy had been committed by the members of such firms respectively, the Plaintiffs were entitled to prove for the debts of *S. & W.* both against that firm and against the firm of *J. F. & Sons*.

And that this right was not affected by the circumstance that *E. F.* had survived the last of his partners

in the firm of *S. & W.* upwards of two months, at the time when the act of bankruptcy was taken to have been committed. *Wickham v. Wickham*, 478

PRIORITY.

See MORTGAGE.
NOTICE

PRIVILEGE.

See PRODUCTION OF DOCUMENTS.

PRODUCTION OF DOCUMENTS.

In a suit by the heir and general devisee of the client against the devisees and executors of the solicitor, to set aside a purchase by him from his client, on the grounds of its being at an undervalue, and the client being then in embarrassed circumstances:—*Held*, that copies of subsequent conveyances from the solicitor to purchasers from him, and a valuation of the estates, and mortgages made by the vendor, were not privileged documents.

Held, that, for the purpose of an application for production of documents, it must be assumed that the Plaintiff's case, as alleged in the bill, is true, in order to test whether he is entitled to production of documents upon that assumption; because, if the Court must wait until the fate of the litigation is known, that would be equivalent to refusing production.

Held, that the executors of the solicitor could not claim privilege against the real representative of the vendor for any documents as confidential communications with the vendor.

The Defendants suggesting that the executors of the vendor, who were also Defendants, had an interest

PUBLIC COMPANY.

in some of the scheduled documents :
—*Held*, that they should be served.
Gresley v. Mousley, 288

PROPERTY.

See INJUNCTION, 1.

PUBLIC COMPANY.

A mining company by its prospectus and certificates professed to be a company in 30,000 shares of 1*l.* each, to be conducted upon the cost-book principle. The Directors passed rules, by one of which it was provided that the company was to be considered as constituted, and the Directors to be at liberty to commence business, so soon as one-third of the shares should have been subscribed; and by another, that no person should be recognised as an adventurer in or entitled to any benefit from the company until he should have signed the rules, and be duly registered in the cost-book as an adventurer. *W. H.* having seen the prospectus, but not the rules, applied verbally and paid for and received certificates of shares in the company. The certificates stated that the shares were to be held subject to the rules of the company. The company failed. *W. H.*, a year after he received the certificates, brought an action to recover his money, and the action was compromised.

Held, 1st—That the certificates were notice of the rules; and although *W. H.*, assuming him not to have had previous notice, would have been allowed, perhaps, a reasonable locus pœnitentiæ to return the certificates, still, having retained them, and not having brought his action for a year, he must be taken to have acquiesced in and to be bound by the rules.

2ndly. That, although *W. H.* had

SECRET TRUST. 803

not signed the rules, still, having applied and paid for and accepted the certificates of shares, he had authorised the company to register his name in the cost-book without his signing the rules; the contract was complete, and he was a "contributory."

Rules peculiar to the cost-book system must be proved. *In re. The Joint Stock Companies Winding-up Acts, 1848 and 1849, and The Great Cambrian Mining and Quarrying Company*;—*Hawkins' case*, 253

PUBLIC POLICY.

See AGREEMENT.

INJUNCTION, 4.

RAILWAY COMPANY.

See INJUNCTION, 4.

PLEADING.

SPECIFIC PERFORMANCE, 2.

RAILWAY SHARES.

See LIEN.

RECTIFYING SETTLEMENT.

See JURISDICTION, 2.

REGISTRATION.

See COPYRIGHT.

CREDITORS.

RELEASE.

See SURETY, 1.

RESIDUE.

See WILL, 1.

SECRET TRUST.

See MORTMAIN, 1, 2.

SECURITY FOR COSTS.

A married woman may sue alone in forma pauperis; but if she sues by a next friend, he must be a substantial person, and capable of answering the costs of the suit. If not, the Defendants may obtain an order to stay proceedings in the suit until the Plaintiff appoints some substantial person her next friend.

The same rule does not hold in an infant's suit, because an infant does not choose his own next friend, and also because the Court readily entertains a suit on behalf of an infant, and will, of its own accord, stay the proceedings in such a suit if not for the infant's benefit.

Where the costs of a former suit for the same purpose, which had been ordered to be dismissed for want of prosecution, were unpaid, the next friend in that suit having died insolvent:—*Held*, that the Court could not stay proceedings in the new suit until those costs were paid.

If no direction is given by the Court concerning the costs of a motion, they are costs in the cause. *Hind v. Whitmore*, 458

SETTLEMENT.

By an ante-nuptial settlement, the intended husband and wife covenanted with the trustees, that, if the intended husband and wife, or either of them in her right, should at any time during the coverture "be or become entitled" to any personal property of the value of 100*l.*, or upwards, the same should be settled. At the time of executing the settlement, the wife was interested in a legacy, which had been bequeathed in trust for all the daughters of her father living at the time of his death,

SOLICITOR.

who should attain twenty-one or marry, in equal shares. The marriage was solemnised, and the wife's father survived her husband:—*Held*, first, that the interest of the wife in the legacy during the coverture was contingent; and,

Secondly, that it was not within the covenant in the settlement. *Atcherley v. Du Moulin*, 186

See COSTS, 1.

LIEN.

PORTION.

POWER OF SALE.

SHIP.

See MERCHANT SHIPPING ACT, 1854.

SOLICITOR.

1. Where a solicitor has been retained for, and has undertaken a particular business, his bill of costs for carrying that business through to its conclusion is but one bill; and where the business in question is the prosecution of a suit, and the solicitor has, by his *crassa negligentia* in the conduct of the suit, caused the suit to be lost, he cannot recover any portion of his bill.

In a cause, commenced by information, the relators' solicitor intending to cross examine two Defendants who had previously been examined in chief on behalf of a co-Defendant, such Defendants were, by mistake, examined upon interrogatories for the examination of witnesses in chief on the part of the informant, and, by reason of this mistake, the information was dismissed, with costs:—*Held*, that the mistake was *crassa negligentia* on the part of the solicitor, and disentitled him to recover any portion of his bill of costs. *Stokes v. Trumper*, 232

2. Bill to set aside a security for a sum therein expressed to be due,

but which was in fact the estimated amount of past costs in a suit, executed by a client in favour of his then solicitor pending the suit, and without the intervention of another legal adviser, dismissed with costs; there being no evidence of pressure or improper conduct on the part of the solicitor, and no evidence or averment of any specific error in the bill of costs; and it appearing that the Defendant had delivered the bill of costs at the time agreed on between him and the Plaintiff, and five years and a half before bill filed, and that the Plaintiff had had ample opportunity for discovering the errors, if any.

The proposition in *Lawless v. Mansfield* (1 Dr. & W. 611), that a general charge is sufficient to open accounts between a solicitor and his client, is in conflict with the rule of the Court of Chancery in *England*, which is, that, if the party seeking to set aside a security for the amount of a bill of costs relies on fraud, or error amounting to evidence of fraud, in the bill of costs, he must aver and prove the specific items, upon which he means to rely, to be fraudulent or erroneous. *Blagrove v. Routh*, 509

See AGREEMENT.

PRODUCTION OF DOCUMENTS.

SONG.

See INJUNCTION, 1, 2.

SPECIAL CASE.

See PRACTICE, 4.

SPECIFIC PERFORMANCE.

1. The Defendant, being the owner of a public-house, wrote to the Plaintiffs, who were a firm of brewers, and offered it to them on lease, at a certain rent, and begged to be informed,

at their earliest convenience, if the offer suited them, "as I am giving all the brewers who have left cards *the* offer in rotation." Subsequently, a clerk of the firm met the Defendant on the premises, and discussed the terms of the lease; and afterwards one of the Plaintiffs wrote to the Defendant—"I have viewed the premises, having had my clerk's report, and we are willing to take them of you."

Held,—1. That such letters constituted a valid agreement for a lease.

2. That, *prima facie*, the terms on which the lease was to be granted must be taken to be those expressed in the first letter.

3. That the Defendant was at liberty to resist a suit for specific performance of such agreement, by proving that he had made a mistake in stating the terms for the lease in the first letter.

4. That such mistake was well proved in this case, by shewing that the Defendant had, previously to writing this letter to the Plaintiffs, offered the premises to other brewers, upon terms which included the stipulation which he stated had been omitted in such letter by mistake; because such previous offer must be taken to be "*the* offer" which he stated in such letter that he was giving to the applicants in rotation.

Held, also, that want of memory and inaccuracy on the part of the Defendant only affected the credibility of his evidence, and did not prejudice his right to relief, as the mistake was clearly proved by other evidence. *Wood v. Scarth*, 33

2. A railway company agreed with a landowner, through whose estate the railway would pass, to construct and maintain a siding connected with their railway at *B*, together with all necessary approaches thereto for pub-

lic use, for the reception and delivery of goods:—*Held*, that specific performance could be decreed of the agreement to construct the siding and approaches without decreeing the company to maintain them when made.

Held, also, that the agreement did not bind the company to erect sheds, or to keep one of their servants in attendance at the siding; but that it obliged them to construct a proper siding, with approaches and a wharf or raised platform for the loading and unloading of goods.

Held further, that "necessary approaches" meant also "proper approaches." *Sir Edward Bulwer Lytton v. The Great Northern Railway Company*, 394

See AGREEMENT.
INJUNCTION, 4, 5.

STATUTES:—

STATUTE OF FRAUDS.

See PRINCIPAL AND AGENT.

9 GEO. 2, c. 36.
See MORTMAIN, 1.

5 GEO. 4, c. 84.
See CONVICT.

6 GEO. 4, c. 16.
See BANKRUPTCY.

3 & 4 WILL. 4, c. 27.
See LIMITATION OF ACTIONS AND SUITS.

5 & 6 WILL. 4, c. 76.
See MUNICIPAL CORPORATION.

6 & 7 WILL. 4, c. 104.
See MUNICIPAL CORPORATION.

SUICIDE

1 VICT. c. 26.
See MORTMAIN, 1, 2.
WILL. 1, 16.

1 VICT. c. 78.
See MUNICIPAL CORPORATION.

1 & 2 VICT. c. 110.
See MUNICIPAL CORPORATION.

2 & 3 VICT. c. 11.
SECT. 4. *See* CREDITORS.

10 & 11 VICT. c. 96.
See TRUSTEE RELIEF ACT.

12 & 13 VICT. c. 106.
See BANKRUPTCY, 1, 2.

15 & 16 VICT. c. 12.
See COPYRIGHT.

15 & 16 VICT. c. 86.
SECT. 38 & 40. *See* PRACTICE, 2.
„ 50. *See* JURISDICTION, 2.

17 & 18 VICT. c. 37.
See FIXTURES.

17 & 18 VICT. c. 104.
See MERCHANT SHIPPING ACT, 1854.

JOINT STOCK COMPANIES WINDING UP ACTS, 1848, 1849.
See PUBLIC COMPANY.

STAYING PROCEEDINGS.

See PRACTICE, 5.

SUICIDE

See PARTNERSHIP, 1.

SURETY.

1. The relief granted in equity to one of two sureties in a deed, whose position has been altered by the acts of the creditor, is, to have the deed delivered up to be cancelled.

Where the creditor had prepared the deed, so as to shew, on the face of it, that it was intended to contain a joint and several covenant by two co-sureties, and had sent it in that form to be executed by one of such sureties, but had not procured the execution of it by the other surety, and had not informed the surety who had executed it of this fact; but, on the contrary, had afterwards written to him as "one of the sureties," the principal debtor having become insolvent:—*Held*, that the surety who had executed the deed was entitled in equity to be relieved from all liability on the covenant.

Semble, that if a creditor release by deed one of two sureties, who are jointly and severally liable, the other is also discharged.

The dicta to the contrary in *Ex parte Giffard* (6 Ves. 805), have not been followed. *Evans v. Bremridge*,
174

2. A letter, written by the agent of a bond creditor to the principal obligor, giving him eighteen months further time to pay the bond debt, upon condition of his paying off at once the arrear of interest, and keeping down the interest to accrue in future:—*Held* to be a mere promise without consideration, and not binding; and therefore *held* that the co-obligor, who had joined in the bond as surety only, was not thereby discharged.

It is not every alteration of his position by the act of the creditor that discharges the surety. To have this effect, the alteration must be

such as interferes for a time with his remedies against the principal debtor.

Where the creditor knew that the surety was negotiating a loan for the principal debtor, for the purpose of paying off therewith the debt for which the surety was liable, and thus getting rid of such liability, and the creditor promised the debtor to give him further time, and this induced the surety to desist from his attempt to raise the money:—*Held*, that the surety's liability to the creditor was not discharged. *Tucker v. Laing*, 745

TABULA IN NAUFRAGIO.

See MORTGAGE, 1.

TENANT FOR LIFE.

See FARMING STOCK.

INJUNCTION, 5.

LIEN.

LIMITATION OF ACTIONS AND SUITS, 3.

WILL, 6, 8.

TENANTS IN COMMON.

See MORTMAIN, 2.

PARTNERSHIP.

TENDER.

See AGREEMENT.

TRADE.

See INJUNCTION, 5.

TROVER.

See PARTNERSHIP.

TRUST.

See LIMITATION OF ACTIONS AND SUITS, 2.

MORTMAIN, 1.

WILL, 5.

TRUSTEE.

See BANKRUPTCY, 2.

COSTS, 2.

POWER OF SALE.

TRUSTEE RELIEF ACT, 1.

TRUSTEE RELIEF ACT.

1. Where trustees, having paid money into court under the Trustee Relief Act (10 & 11 Vict. c. 96), afterwards apply by petition under the 4th Order of the 10th of June, 1848, for a distribution of the fund, the Court has jurisdiction to make an order upon the petition, and is bound to exercise that jurisdiction.

But where such a petition was presented by trustees without consent of the parties claiming beneficial interests in the fund, and no cause was shewn by the trustees for taking upon themselves to be the movers in the matter, the Court, to discourage such applications, allowed them only respondents' costs. *In re Casneau's Legacy under Housman's Will*, 249

2. A petitioner claiming a fund under the Trustee Relief Act allowed his costs although his claim failed.

According to the present practice, a respondent unnecessarily served is not, as a matter of course, entitled to his costs of appearing. *In re Birch's Legacy under Bissell's Will*, 369

UNDUE INFLUENCE.

In every case of a gift to a parent by a child shortly after the child attains majority, the Court looks with jealousy upon the transaction, more especially when the parent has, during the minority, been guardian of the child's property, and in receipt of the rents of a considerable estate; and throws upon the parent the onus of shewing plainly and unequivocally that the gift was made, not in conse-

quence of representations on his part, but by the spontaneous act of the child, and that the child had full knowledge of the nature of the deed by which the gift was effected, and of his own position and rights in reference to the property.

A deed was executed by a lady, five months after she came of age, disentailing part of her estates, and giving, for a nominal consideration, an estate for life in the disentailed part to her father, who, during her minority, had been her guardian, and in receipt of the rents of her estates:—*Held* (obiter), that if a bill had been filed shortly after the transaction, either before or possibly after the lady's marriage, which was solemnised sixteen months after the execution of the deed, the transaction could not have been supported,—the deed itself not explaining the nature of the transaction, and it not being shewn that the daughter had proper professional advice, that the nature of the transaction was explained to or understood by her,—or that the gift was spontaneous or made at a time or under circumstances when she was free from parental influence.

But a bill, which, after the daughter's decease, and nearly ten years after the execution of the deed, was filed by her husband on whom her rights had devolved, praying to have the father declared a trustee of the life interest, and an account of the rents which accrued during his daughter's minority or afterwards, was dismissed on the ground of laches,—it appearing (*inter alia*) that the Plaintiff was aware of all the circumstances previously to his marriage, and the Court being of opinion, upon the evidence, that, eight years before the bill was filed, both the Plaintiff and his deceased wife had acquiesced in the transaction. *Wright v. Vanderplank*, 1

VENDOR AND PURCHASER.

See MORTGAGE.

PRODUCTION OF DOCUMENTS.

SPECIFIC PERFORMANCE, 1, 2.

WATER.

See INJUNCTION, 3.

WILL.

1. Testator by his will, in 1847, devised specific real estate to his daughter *M.*, and, after making several specific bequests, devised and bequeathed *all other real and personal estate of which he might be possessed*, to *M.*, and others of his children. *M.* died in his lifetime:—*Held*, that the devise expressed by the words “all other &c.” was a residuary devise within 7 Will. 4 & 1 Vict. c. 26, s. 25, and included the real estate devised to *M.* *Cogswell v. Armstrong*, 227

2. Where a testator has charged his real estate with the payment of a sum of money, he is to be taken to have given an implied power of sale to some one. The donee of the power is to be ascertained from the whole of the will.

A testator devised his real estate to the use of *A.* and *B.*, during the life of *C.* (a married woman), upon trust for her, with remainder to the use of the right heirs of *C.*, and charged such real estate with the payment of 700*l.* to *D.*:—*Held*, that *A.* and *B.* had a power of sale during the life of *C.* *Eidsforth v. Armstead*, 333

3. A bequest to *A.* for life, and after *A.*'s death to *B.*, “if he be then living and able to give my executors a good and valid discharge for the same,” otherwise, gift over to *C.*; and

then another bequest of residue to *C.*, “if he shall be living and able duly to discharge my executors at the time such residue is payable, but if otherwise,” gift over to *B.*

B. and *C.* were infants at the date of the will, and *C.* was an infant at the death of the testator:—*Held*, that *C.*'s infancy did not prevent his performing the condition, as he could duly discharge the executors by a suit in Chancery.

Semble, the question would have been more difficult if the terms of the condition had been the same as those of the condition annexed to the bequest to *B.* *Ledward v. Hassells*, 370

4. A testator gave all his real and personal property to his wife for life, and he gave a sum of stock to his five cousins by name, or the survivors of them, to be equally divided between them, and to be paid as soon as possible after the death of his wife:—*Held*, that, following the rule in *Cripps v. Wolcott*, (4 Mad. 11), the survivorship must be referred to the death of the testator's wife, so that one of the cousins who survived the testator, and died in the lifetime of his widow, took nothing.

Held, also, that “survivors” must be construed to include a sole survivor, so that where only one of the legatees survived the widow, such survivor took all the stock. *Hearn v. Baker*, 383

5. A devise of all the testator's residuary real estate to trustees in fee, upon trust to pay the rents to *A.* for life, and, after his death, upon trust to convey the same residuary real estate to such person as should answer the description of the testator's heir-at-law—breaks the descent of real estate which had descended to the testator *ex parte materna*, and vests it in his heir-at-law as equitable devisee. *Davis v. Kirk*, 391

6. Gift by will of all the testator's funded property and other personal and real estate to his daughter *S.*, she paying all his debts, "and the said *S.* shall in no way dispose of any of the said funded property, but to hold the same for her natural life; and if she should die without issue, the said landed property shall go to *J.* for life. I will and direct that all the funded property shall go to *W.* and her heirs, for ever."—*Held*, that *S.* took the funded property for life only, and that on her death it belonged to *W.* *In re Banks's Trusts*,

387

7. A devise in 1822 of real estate to *S.*, upon condition that she pay 50*l.* to *B.* by instalments of 10*l.* a year; but in case *S.* dies without issue, the land to go to *T.* or his heirs, "in consideration that he pays to *J.* or his heirs the sum of 250*l.*, twelve months after the death of *S.*."—*Held*, that the gift conferred upon *S.* a fee simple by reason of the charge of 50*l.*; and that the gift over was to take effect upon her death without issue then living, from the direction that the executory devisee was to pay the 250*l.* twelve months after the death of *S.*

Wyld v. Lewis (1 Atk. 432) distinguished. *Blinston v. Warburton*,

400

8. Devise in 1820 of estates *A.* and *B.* to the testator's wife for life, and after her death, estates *A.*, *B.*, and *C.* to the testator's son *J.*, without words of limitation. Subsequently a devise of an annuity of 10*l.* to *D.* for life, to be paid out of estate *A.* by *J.*:—*Held*, that *J.* took an estate in fee simple in *A.*, but a life estate only in *B.* and *C.* *Matthews v. Windross*,

406

9. A gift by will of real and personal estate to trustees, upon trust to pay half the income to *E.* for life, and after her death to her child or children equally; the shares of sons

to be vested in them on attaining twenty-five, and of daughters on attaining that age or day of marriage, which should first happen, and in the meantime to be applied for their maintenance, with survivorship in case of the death of any child before twenty-five or marriage respectively, with a similar gift to *S.* and her children of the other moiety, and a gift over in case of the death of either *E.* or *S.* without leaving issue, or leaving such and they should all die under twenty-five:—*Held*, that the limitations to the children of *E.* and *S.* were void for remoteness.

Held also, that the direction for maintenance was altogether void.

The testator was a freeman of the city of *London*:—*Held*, that the property, the gift of which had failed, was not subject to the custom of *London*, but must be divided according to the Statute of Distributions.

Two suits having been instituted to obtain the decision of the Court upon the construction of the will, one as to the testator's real, and the other as to his personal, estate:—*Held*, that the costs of both must be borne by the personal estate in the first instance. *Pickford v. Brown*, *Brown v. Brown*,

426

10. Testator, by his will in 1832, gave all his money, *securities for money*, household furniture, &c., and all other the rest and residue of his *personal estate* and effects, *subject to the payment of debts and legacies*, to his wife, her executors, administrators, and assigns absolutely:—*Held*, that the legal estate of certain mortgaged hereditaments, which was vested in the testator at the date of his will, passed under the term "*securities for money*;" and that the concurrence of the testator's heir was not necessary to make an effectual conveyance of the mortgaged premises to a purchaser.

Galliers v. Moss (9 B. & C. 267), must be treated as overruled by subsequent decisions. *Knight v. Robinson*, 503

11. A bequest of residue "to all the children of my brother *R.* and my sister *M.*, to be equally divided between them, share and share alike." *R.* and *M.* having equal legacies in a former part of the will, and there being nothing in the context from which an intention could be inferred that *M.* was personally to take an equal share in the residue with the children of *R.*, this construction was rejected, and the gift was held to pass the residue to the children of *R.* and the children of *M.* in equal shares. *Mason v. Baker*, 567

12. Bequests of sums of stock to the following societies in London: *The Church Building Society*, *The Clergy Society*, *The Society for Promoting Christian Knowledge*, *The Church Missionary Society*, and *The Clergy Orphan Society*. There being no society answering the description of *The Clergy Society*:—*Held*, that extrinsic evidence could not be received to prove, that, by that name, a charity not in London was intended.

Held, also, that a scheme cy pres must be directed, and that this must be done in the presence of the Attorney-General. *In re The Clergy Society*, 615

13. Bequest by will, dated in 1849, of an annuity to *A.* Codicil revoking other legacies and confirming the will, was signed by *A.* as an attesting witness:—*Held*, that the annuity given to him by the will was not thereby made void.

Bequest of "household furniture, plate, linen, china, glass, books, pictures, plated articles, prints, and all

and singular other my household furniture and effects, which at the time of my decease shall be in and about my said mansion-house":—*Held*, not to include articles exclusively of personal ornament, and not adapted for the use or ornament of the house.

Bequest of charitable legacies, with a direction that they should be paid in precedence to the other pecuniary legacies out of such part of the testator's personal property not specifically bequeathed, as was by law applicable for charitable purposes. This fund being insufficient to pay all the charitable legacies:—*Held*, that, following out the principle of *Robinson v. Geldard* (3 Mac. & G. 735), the debts, and funeral and testamentary expenses, and the costs of a suit for administration, must be paid, in the first instance, out of the personal estate savouring of realty. *Tempest v. Tempest*, 635

14. A married woman, by her will, in exercise of a power of appointment over trust moneys, made several bequests, and "after payment of her just debts, funeral and testamentary expenses, and the expenses attending the execution of her will, appointed" the residue of the trust moneys among her nieces:—*Held*, that the charge of funeral expenses was not contingent upon her surviving her husband, and that her husband surviving was entitled to repayment out of the trust moneys of money paid by him in respect of such expenses. *Willster v. Dobie*, 647

15. Devise of real estate to one and her children,—*Held*, although there were children in esse at the date of the will, to create an estate tail; that being the only mode of carrying into effect the whole intention of the will.

The word "living" is sufficient to pass the advowson, but it may be restricted to the next presentation. The context must determine which is its meaning.

Devise to a minor of "the livings of Q. and C., should he like the profession and be qualified for them:"—*Held*, to shew an intention to confer on the devisees a personal benefit; therefore, that the devise was confined to a single presentation, and did not extend to the advowson. *Webb v. Byng*, 669

16. The enactment in sect. 33 of the Wills Act, 7 Will. 4 & 1 Vict. c. 26, that a bequest to a child of the testator, who dies in the testator's lifetime leaving issue living at the testator's death, shall not lapse, applies to a testamentary appointment made in exercise of a general power.

Distinction, in reference to this subject, between a general and a limited power.

Testatrix, by her will in 1840, in exercise of a general power, appointed proceeds of real estate to a daughter who died in her lifetime, leaving issue living at the testatrix's death:

—*Held*, that the personal representative of the daughter was entitled. *Eccles v. Cheyne*, 676

17. A bequest of personalty to certain persons "or their heirs for ever," the word "heirs" being a word of substitution and not a designation persons:—*Held*, to denote not the nearest of kin in blood, but those who, under the Statutes for the Distribution of the personal estates of intestates, would have been entitled to the personal estates of such persons if they had died intestate. *Doody v. Higgins*, 729

18. Devise "to William Marshall, my second cousin." Testator had no second cousin so named, but he had two first cousins once removed, one named William Marshall, the other named William John Robert Blandford Marshall:—*Held*, a latent ambiguity, and parol evidence admitted to dissolve it. *Bennett v. Marshall*, 740

See ELECTION.

LAPSE, 1, 2.

MARRIED WOMAN, 3.

MORTMAIN, 1, 2.

SETTLEMENT.

LONDON:

PRINTED BY W. TYLER, BOLT COURT, FLEET STREET.





